

U.S. Customs and Border Protection



APPLICATION TO ESTABLISH A CENTRALIZED EXAMINATION STATION

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 22, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0061 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) invites the general public and other Federal agen-

cies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Application to Establish a Centralized Examination Station.

OMB Number: 1651-0061.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: A Centralized Examination Station (CES) is a privately operated facility where merchandise is made available to CBP officers for physical examination. If a port director decides that a CES is needed, he or she solicits applications to operate a CES. The information contained in the application is used to determine the suitability of the applicant's facility; the fairness of fee structure; and the knowledge of cargo handling operations and of CBP procedures and regulations. The names of all principals or corporate officers and all employees who will come in contact with uncleared cargo are also to be provided so that CBP may perform background investigations. The CES application is provided for by 19 CFR 118.11 and is authorized by 19 U.S.C. 1499, Tariff Act of 1930.

CBP port directors solicit these applications by using port information bulletins, local newspapers, and/or the internet. This collection of information applies to the importing and trade community, which is familiar with import procedures and with the CBP regulations.

Type of Information Collection: Application for CES.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 50.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 100.

Dated: June 15, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, June 21, 2022 (85 FR 36867)]



DELIVERY TICKET

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than August 22, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0081 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief,

Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Delivery Ticket.

OMB Number: 1651–0081.

Form Number: CBP Form 6043.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 6043, *Delivery Ticket*, is used to document transfers of imported merchandise between parties. This form collects information such as the name and address of the

consignee; the name of the importing carrier; lien information; the location of where the goods originated and where they were delivered; and information about the imported merchandise. CBP Form 6043 is completed by warehouse proprietors, carriers, Foreign Trade Zone operators and other trade entities involved in transfers of imported merchandise. This form is authorized by 19 U.S.C. 1551a and 1565, and provided for by 19 CFR 4.34, 4.37 and 19.9. It is accessible at: <https://www.cbp.gov/newsroom/publications/forms>.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: Delivery Ticket (Form 6043).

Estimated Number of Respondents: 1,156.

Estimated Number of Annual Responses per Respondent: 200.

Estimated Number of Total Annual Responses: 231,200.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 57,800.

Dated: June 15, 2022.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, June 21, 2022 (85 FR 36867)]

**PROPOSED MODIFICATION OF ONE RULING LETTER
AND REVOCATION OF ONE RULING LETTER, AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF WOODEN PAINT
MIXING STICKS WITH MEASUREMENT MARKINGS AND A
WOODEN YARDSTICK**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of one ruling letter and revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of wooden paint mixing sticks with measurement markings and a wooden yardstick.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises

interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a wooden yardstick, and modify one ruling letter concerning the tariff classification of wooden paint mixing sticks with measurement markings under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 5, 2022..

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at dwayne.rawlings@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to

the tariff classification of wooden paint mixing sticks with and without measurement markings, and revoke one ruling letter pertaining to the tariff classification a wooden yardstick. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N266261, dated July 21, 2015 (Attachment A), and NY N266749, dated July 22, 2015 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer’s failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N266261 and NY N266749, CBP classified certain wooden paint mixing sticks with and without measurement markings, and a wooden yardstick, in heading 4417, HTSUS, specifically in subheading 4417.00.8090, HTSUS, which provides for “Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: Other: Other.” CBP has reviewed NY N266261 and NY N266749 and has determined the ruling letters to be in error with respect to the mixing sticks with measurement markings and the yardstick. It is now CBP’s position that the wooden paint mixing sticks with measurement markings, and the wooden yardstick, are properly classified in heading 9017, HTSUS, specifically in subheading 9017.80.00, HTSUS, which provides for “Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other instruments.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N266261 and revoke NY N266749, and to revoke or modify any other

ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H309089, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N266261

July 21, 2015

CLA-2-44:OT:RR:NC:N4:234

CATEGORY: Classification

TARIFF NO.: 4417.00.8090

MR. GANG HE
SHLA GROUP, INC.
615 HAWAII AVENUE
TORRANCE, CA 90503

RE: The tariff classification of yard stick and paint mixing stick from China

DEAR MR. HE:

In your letter dated June 30, 2015, on behalf of your client, The Home Depot, you requested a tariff classification ruling. A photographs of the sample were submitted for our review. The samples are as follows:

Item# HDYS-3 is a one yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the "The Home Depot" company logo imprinted on it. The yard stick will be sold exclusively to The Home Depot.

Item# PS1 is a paint wooden mixing stick for one gallon paint. The mixing stick has a 7 inch ruler printed on one side for the user to estimate how much paint is left in the can. The mixing stick will be imported with the "The Home Depot" company logo and the wording: Don't forget to pick up your painting supplies: paint brush, paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.

Item# PS-5 is a paint wooden mixing stick for five gallon paint. The mixing stick has a 15 inch ruler printed on one side for the user to estimate how much paint is left in the can. The Home Depot company logo and the wording: Don't forget to pick up your painting supplies: paint brush, paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.

Item # HDPS 10 is a 10 pack of blank paint wooden mixing sticks put up for retail sale. They are to be used for mixing one gallon sized containers of paint.

Per our conversation and your email, the ruling request for Item # PCOSU1, a Paint Can and Bottle Opener, will be broken out from this ruling and considered in a separate ruling.

The applicable subheading for the HDYS-3, PS1, PS-5, HDPS10 will be 4417.00.8090, HTS, which provides for other (than certain enumerated) tools and tool bodies, of wood. The rate of duty will be 5.1 percent ad valorem

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Albert Gamble at albert.gamble@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER

Director

National Commodity Specialist Division

ATTACHMENT B

N266749

July 22, 2015

CLA-2-44:OT:RR:NC:N4:234

CATEGORY: Classification

TARIFF NO.: 4417.00.8090

MR. GANG HE
SHLA GROUP, INC.
615 HAWAII AVENUE
TORRANCE, CA 90503

RE: The tariff classification of yard stick from China

DEAR MR. HE:

In your letter dated June 30, 2015, on behalf of your client Lowe's, you requested a tariff classification ruling. A photograph of the sample was submitted for our review.

Item # LYS-3 is a one yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the Lowe's company logo imprinted on it. The yard stick will be sold exclusively to Lowe's Inc.

The applicable subheading for the LYS-3 will be 4417.00.8090, HTS, which provides for other (than certain enumerated) tools and tool bodies, of wood. The rate of duty will be 5.1 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Albert Gamble at albert.gamble@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER

Director

National Commodity Specialist Division

ATTACHMENT C

HQ H309089

CLA-2 OT:RR:CTF:EMAIN H309089 DSR

CATEGORY: Classification

TARIFF NO.: 9017.80.00; 9903.88.03

MR. GANG HE
SHLA GROUP, INC.
615 HAWAII AVENUE
TORRANCE, CA 90503

RE: Modification of NY N266261 and revocation of NY N266749; Tariff classification of wooden paint mixing sticks with and without measurement markings, and a wooden yardstick

DEAR MR. HE:

This letter is in reference to a request submitted on behalf of SHLA Group, Inc., to reconsider New York Ruling Letters (“NY”) N266261 (July 21, 2015) and NY N266749 (July 22, 2015). NY N266261 pertains to the classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of wooden paint mixing sticks with and without measurement markings. NY N266749 pertains to the HTSUS classification of an article identified as a one-yard wooden stick (Item LYS-3). Each article is imported from China.

Both rulings classified the above articles under subheading 4417.00.80, HTSUS, which provides for “Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: Other.” We have reviewed the tariff classification of the article and have determined that the cited rulings are in error. Therefore, NY N266261 is modified, and NY N266749 is revoked, for the reasons set forth in this ruling.

FACTS:

In NY N266261, the subject articles are described as follows:

Item HDYS-3 is a one-yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the “The Home Depot” company logo imprinted on it. The yard stick will be sold exclusively to The Home Depot. Additional information submitted with the reconsideration request shows that item HDYS-3 is also imprinted with measurement markings along its length.

Item PS1 is a paint wooden mixing stick for one gallon paint. The mixing stick has a 7-inch ruler printed on one side for the user to estimate how much paint is left in the can. The mixing stick will be imported with the “The Home Depot” company logo and the wording: “Don’t forget to pick up your painting supplies: paint brush, paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.”

Item PS-5 is a paint wooden mixing stick for five-gallon paint. The mixing stick has a 15-inch ruler printed on one side for the user to estimate how much paint is left in the can. The Home Depot company logo and the wording: “Don’t forget to pick up your painting supplies: paint brush,

paint roller, paint roller cover, paint tray, tape, drop cloth, rag, stir sticks, paint kits, and the letters FSC® as well as FSC® A000519.”*

In NY N266749, the article is described as follows:

Item # LYS-3 is a one yard wooden stick. The yard stick is used as a ruler for measurement. The wooden yard stick will be imported with the Lowe’s company logo imprinted on it. The yard stick will be sold exclusively to Lowe’s Inc.

Additional information submitted with the reconsideration request shows that Item LYS-3 is also imprinted with measurement markings along its length and is useful for “gardening,” but does not indicate how the item would be used for gardening.

ISSUE:

Whether the articles described above are classified in heading 4417, HTSUS, as tools of wood, or in heading 9017, HTSUS, as instruments for use in the hand for measuring length.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

| | |
|------------|--|
| 4417 | Tools, tool bodies, tool handles, broom or brush bodies and handles, of wood; boot or shoe lasts and trees, of wood: * * * |
| 4417.00.80 | Other. * * * |
| 9017 | Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: * * * |
| 9017.80.00 | Other instruments. |

* NY N266261 also addressed a fourth product, which was identified as “item HDPS-10” and described as a 10 pack of blank paint wooden mixing sticks put up for retail sale. This product is not at issue in this ruling.

In addition, in interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 *Fed. Reg.* 35127 (August 23, 1989).

Note 1(m) to Chapter 44, HTSUS, excludes goods of Section XVIII from Chapter 44, HTSUS (Section XVIII, HTSUS, contains Chapter 90, HTSUS). As such, if the subject articles are within the scope of heading 9017, HTSUS, they are precluded from classification in heading 4417, HTSUS.

Heading 9017, HTSUS, refers to “instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter.” As EN 90.17 (D) explains:

These instruments are capable of indicating the length, i.e., linear dimensions, of the object to be measured, for example a line drawn or imaginary (straight or curved) on the object. The instruments are therefore capable of measuring dimensions such as diameters, depths, thicknesses and heights which are indicated as a unit of length (e.g., millimeters). These instruments must also have characteristics (size, weight, etc.) which enable them to be held in the hand to carry out the measurement.

Items HDYS-3, PS-1 and PS-5 at issue in NY N266261 and Item LYS-3 at issue in NY N266749 are imprinted with markings that enable a user of the items to perform the act of measuring as required by heading 9017, HTSUS. In short, they are rulers that measure, and are therefore *prima facie* classifiable under heading 9017, HTSUS, as instruments for measuring length and for use in the hand. That these articles can also be used to stir paint does not cause them to fall outside the scope of heading 9017, HTSUS. Consequently, they are precluded from classification in heading 4417, HTSUS, by operation of Note 1(m) to Chapter 44.

HOLDING:

By application of GRIs 1 and 6, the items designated as HDYS-3, PS-1, PS-5 and LYS-3 are classified in heading 9017, HTSUS, specifically in subheading 9017.80.00, HTSUS, which provides for “Drawing, marking-out or mathematical calculating instruments (for example, drafting machines, pantographs, protractors, drawing sets, slide rules, disc calculators); instruments for measuring length, for use in the hand (for example, measuring rods and tapes, micrometers, calipers), not specified or included elsewhere in this chapter; parts and accessories thereof: Other instruments.” The column one, general rate of duty is 5.3% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at www.usitc.gov.

Pursuant to U.S. Note 20(f) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9017.80.00, HTSUS, unless specifically excluded, are subject to an additional 25% percent *ad valorem* rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 9017.80.00, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited

above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>, respectively.

EFFECT ON OTHER RULINGS:

NY N266261 (July 21, 2015) is hereby modified and NY N266749 (July 22, 2015) is hereby revoked.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

**PROPOSED REVOCATION OF FOUR RULING LETTERS
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF
COMPOSITE PORTABLE STORAGE BATTERIES**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of five ruling letters, and proposed revocation of treatment relating to the tariff classification of composite portable storage batteries.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke three ruling letters concerning tariff classification of combination portable storage batteries under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 5, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

FOR FURTHER INFORMATION CONTACT: Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0092.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke five ruling letters pertaining to the tariff classification of composite storage batteries. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") H82059 (June 28, 2001) (Attachment A); NY R04727 (September 14, 2006) (Attachment B); NY N005077 (January 23, 2007) (Attachment C); NY N034766 (August 12, 2008) (Attachment D); and NY N081177 (November 4, 2009) (Attachment E), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the five identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177, CBP classified composite portable storage batteries in subheading 8504, HTSUS, specifically in subheading 8504.40.95, HT-

SUS, which provided for “Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof: Other.” CBP has reviewed NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177, and has determined the ruling letters to be in error. It is now CBP’s position that the combination portable storage batteries are properly classified in heading 8507, HTSUS, specifically in sub-heading 8507.20.80, HTSUS, which provides for “Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Other lead-acid storage batteries: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY H82059, NY R04727, NY N005077, NY N034766, and NY N081177, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H206455 set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

NY H82059

June 28, 2001

CLA-2-85:RR:NC:MM:109 H82059

CATEGORY: Classification

TARIFF NO.: 8504.40.9550

MS. RACHEL DEBROSSE
OVERSEAS ADMINISTRATOR
RALLY MANUFACTURING, INC.
5255 NW 159TH STREET
MIAMI, FL 33014

RE: The tariff classification of a “Jumper with 260PSI Compressor” from China

DEAR MS. DEBROSSE:

In your letter dated May 25, 2001, you requested a tariff classification ruling.

The merchandise is described in your letter as a “Jumper with 260PSI Compressor.” This item has 3 main features: Jumper Cable Clamps, Battery Jumper (with lead-acid battery, including housing) and 260PSI Compressor. Your letter states that the Battery Jumper is the main feature. This item is for use in automobiles, boats and other moving vehicles to provide battery power to dead batteries, cell phones and charges along with lighting. It can also be used to inflate tires and recreation inflatables such as beach balls, soccer balls and more. A sample of the merchandise was submitted to this office.

This item is a composite good consisting of a static converter of Heading 8504 and a compressor of Heading 8414. However, in accordance with GRI 3(a), neither heading provides a more specific description. Therefore, each of these headings is considered equally specific in relation to the “Jumper with 260PSI Compressor.” It is the opinion of this office that neither component imparts the essential character of the article. As a result, classification cannot be determined by GRI 3(b). In adherence with GRI 3(c), since the merchandise cannot be classified by reference to 3(a) or 3(b), the merchandise shall be classified under the heading, which occurs last in numerical order among those which equally merit consideration, namely 8504 and 8414. In this instance, Heading 8504 occurs last in numerical order among those headings meriting equal consideration. Subsequently, Heading 8504 applies.

The applicable subheading for the “Jumper with 260PSI Compressor” will be 8504.40.9550, Harmonized Tariff Schedule of the United States (HTS), which provides for “Static converters: Other, Rectifiers and rectifying apparatus: Other.” The rate of duty will be 1.5 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 212-637-7048.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

ATTACHMENT B

NY R04727

September 14, 2006
CLA-2-85:RR:E:NC:MM:109 R04727
CATEGORY: Classification
TARIFF NO.: 8504.40.9530

MR. DEREK K. SAKAGUCHI
PRESIDENT
MICOM CHB, INC.
460 S. HINDRY AVE.
UNIT C
INGLEWOOD, CA 90301

RE: The tariff classification of a portable rechargeable power station-jump start for vehicles from China

DEAR MR. SAKAGUCHI:

In your letter dated August 23, 2006, you requested a tariff classification ruling on behalf of your client, Roadmaster USA Corporation of Eatontown, New Jersey.

The merchandise subject to this letter is identified as a portable 12-volt rechargeable power station jump-start for vehicles (JNS 1800). The unit is designed for auxiliary and emergency use and has the following features: 12-volt DC sockets with overload protection, an on/off switch, a 15 amp fuse, a battery condition indicator light, a work light, a light switch and a charging adaptor input. A 120-volt AC power supply with one spare 3-watt light bulb and one spare 15-amp fuse are included in the accessories compartment found on the back of the JNS 1800 unit, which is secured by two heavy-duty plastic handle battery clamps (red = positive (+) and black = negative (-)). The battery charging life is as high as 36 months and can be recycled after its use.

The applicable subheading for the portable rechargeable power station jump start for vehicles (JNS 1800) will be 8504.40.9530, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Static converters: Other: Rectifiers and rectifying apparatus: Power supplies: With a power output exceeding 150W but not exceeding 500W." The rate of duty will be 1.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646-733-3015.

Sincerely,

ROBERT B. SWIERUPSKI
Director,

National Commodity Specialist Division

ATTACHMENT C

N005077

January 23, 2007

CLA-2-85:RR:NC:MM:109

CATEGORY: Classification

TARIFF NO.: 8504.40.9550

MR. HARLEY ALLEN
MANAGER CUSTOMS COMPLIANCE
BLACK & DECKER CORP.
PORTER CABLE/DELTA DEVILBISS DIVISIONS
4825 HIGHWAY 45 NORTH
JACKSON, TN 38305

RE: The tariff classification of a 12-volt AC/DC portable power supply, jump starter, and inflator from an unspecified country

DEAR MR. ALLEN:

In your letter dated January 5, 2007 you requested a tariff classification ruling.

The merchandise subject to this ruling is a 12-volt AC/DC portable power supply, jump starter, and inflator. It is identified within your letter as product number VEC026BD. The VEC026BD is cordless and rechargeable. It powers and/or charges AC/DC appliances (includes two 120 volt receptacles and two 12 volt receptacles), jump starts vehicles, functions as an air compressor for inflating tires and sports equipment, and includes an LED work light for emergency roadside assistance. The primary use for this product is that of a recharging power supply, and as such can be used for camping, tailgating, etc. where no wall outlet is available.

The applicable subheading for the 12-volt AC/DC portable power supply, jump starter, and inflator product number (VEC026BD) will be 8504.40.9550, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Static converters: Other: Rectifiers and rectifying apparatus: Other." The rate of duty will be 1.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646-733-3015.

Sincerely,

ROBERT B. SWIERUPSKI

Director,

National Commodity Specialist Division

ATTACHMENT D

N034766

August 12, 2008
CLA-2-85:OT:RR:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8504.40.9550

MR. HARLEY ALLEN
MANAGER CUSTOMS COMPLIANCE
BLACK & DECKER CORP.
PORTER CABLE/DELTA DEVILBISS DIVISIONS
4825 HIGHWAY 45 NORTH
JACKSON, TN 38305

RE: The tariff classification of a 12-volt DC portable power supply, jump starter, and inflator from an unspecified country

DEAR MR. ALLEN:

In your letter dated July 23, 2008 you requested a tariff classification ruling.

The merchandise subject to this ruling is a 12-volt DC portable power supply, jump starter, and inflator, all within one housing. This item is identified within your letter as product number VEC012CBD. The VEC012CBD has a 12 volt DC accessory outlet to power and/or charge DC electronics. The jump starter jump-starts vehicles without the need of another vehicle's battery. The air compressor can be used to inflate tires and sports equipment. The VEC012CBD, which is cordless and rechargeable, includes an LED light for emergency roadside assistance, a 12 volt DC charger, a 120 volt AC charger, heavy-duty cables & clamps, and an adapter nozzle set. The primary use for this product is that of a recharging power supply, which can be used for camping, tailgating, etc. where no wall outlet is available.

The applicable subheading for the 12-volt AC/DC portable power supply, jump starter, and inflator product number VEC012CBD will be 8504.40.9550, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Static converters: Other: Rectifiers and rectifying apparatus: Other." The rate of duty will be 1.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646-733-3015.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT E

N081177

November 4, 2009
CLA-2-85:OT:RR:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8504.40.9530

MS. JOAN JEROME
ALLIED INTERNATIONAL
13207 BRADLEY AVE.
SYLMAR CA 91342

RE: The tariff classification of a 5-In-1 portable power pack from China

DEAR MS. JEROME:

In your letter dated October 21, 2009, you requested a tariff classification ruling.

The merchandise under consideration is a 5-In-1 portable power pack. It is identified within the product literature as ITEM 96157-1VGA. It is 12V, 17 amp hour rechargeable lead acid battery with dual 12V outlets. It has 36" jump-start cables with copper-plated clamps, a 260 PSI air compressor with gauge, a 400 watt power inverter with dual AC outlets, an LED map light, AC and DC power ports and a battery level indicator. The 5-In-1 portable power pack is housed in a heavy duty rubberized case.

This product is used in automobiles, on boats, and other types of vehicles to provide battery power to dead batteries, cell phones, and other devices that require power. It can also be used to inflate tires, and recreation inflatables, such as sports balls. The LED light can be used to read a map or for emergency lighting.

The applicable subheading for the 5-In-1 portable power pack (ITEM 96157-1VGA) will be 8504.40.9530, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Static converters: Other: Rectifiers and rectifying apparatus: Power supplies: With a power output exceeding 150W but not exceeding 500W." The rate of duty will be 1.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at (646) 733-3015.

Sincerely,

ROBERT B. SWIERUPSKI

Director

National Commodity Specialist Division

ATTACHMENT F

HQ H206455
CLA-2 OT:RR:CTF:EMAIN H206455 DSR
CATEGORY: Classification
TARIFF NO.: 8507.20.80

MS. RACHEL DEBROSSE
OVERSEAS ADMINISTRATOR
RALLY MANUFACTURING, INC.
5255 NW 159TH STREET
MIAMI, FL 33014

MR. DEREK K. SAKAGUCHI
PRESIDENT
MICOM CHB, INC.
460 S. HINDRY AVE.
UNIT C
INGLEWOOD, CA 90301

MR. HARLEY ALLEN
MANAGER CUSTOMS COMPLIANCE
BLACK & DECKER CORP.
PORTER CABLE/DELTA DEVILBISS DIVISIONS
4825 HIGHWAY 45 NORTH
JACKSON, TN 38305

MS. JOAN JEROME
ALLIED INTERNATIONAL
13207 BRADLEY AVE.
SYLMAR CA 91342

RE: Revocation of NY H82059, NY R04727, NY N005077, NY N081177 and NY N034766; Classification of composite portable storage batteries.

DEAR MS. DEBROSSE AND MS. JEROME, AND MESSRS. SAKAGUCHI AND ALLEN:

This letter is in reference to New York Ruling Letters (NY) H82059 (June 28, 2001); NY R04727 (September 14, 2006); NY N005077 (January 23, 2007); NY N034766 (August 12, 2008); and NY N081177 (November 4, 2009), regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of composite portable storage batteries. The rulings classified the devices under subheading 8504.40.95 HTSUS, which provides for static converters, other.

We have reviewed the tariff classification of the devices and have determined that the cited rulings are in error. Therefore, we are revoking NY H82059, NY R04727, NY N005077, NY N034766 and NY N081177 for the reasons set forth in this ruling.

FACTS:

The device at issue in NY H82059 (June 28, 2001) is described as a “Jumper with 260PSI Compressor.” The item has three main features: jumper cable clamps, battery jumper (with lead-acid battery, including housing) and a 260PSI compressor. The item is for use in automobiles, boats and other moving vehicles to provide battery power to dead batteries, cell phones and

charges along with lighting. It can also be used to inflate tires and recreation inflatables such as beach balls, soccer balls and more.

The device at issue in NY R04727 (September 14, 2006) is described as a portable 12-volt rechargeable power station jump-start for vehicles (JNS 1800). The unit is designed for auxiliary and emergency use and has the following features: 12-volt DC sockets with overload protection, an on/off switch, a 15-amp fuse, a battery condition indicator light, a work light, a light switch and a charging adaptor input. A 120-volt AC power supply with one spare 3-watt light bulb and one spare 15-amp fuse are included in the accessories compartment found on the back of the JNS 1800 unit, which is secured by two heavy-duty plastic handle battery clamps (red = positive (+) and black = negative (-)). The battery charging life is as high as 36 months and can be recycled after its use.¹

The device at issue in NY N005077 (January 23, 2007) is described as a 12-volt AC/DC portable power supply, jump starter and inflator. It is identified as product number VEC026BD. The VEC026BD is cordless and rechargeable. It powers and/or charges AC/DC appliances (includes two 120-volt receptacles and two 12-volt receptacles), jump starts vehicles, functions as an air compressor for inflating tires and sports equipment, and includes an LED work light for emergency roadside assistance.²

The device at issue in NY N034766 (August 12, 2008) is described as a 12-volt DC portable power supply, jump starter, and inflator, all within one housing. This item is identified within your letter as product number VEC012CBD. The VEC012CBD has a 12-volt DC accessory outlet to power and/or charge DC electronics. The jump starter jump-starts vehicles without the need of another vehicle's battery. The air compressor can be used to inflate tires and sports equipment. The VEC012CBD, which is cordless and rechargeable, includes an LED light for emergency roadside assistance, a 12-volt DC charger, a 120-volt AC charger, heavy-duty cables & clamps, and an adapter nozzle set.³

The device at issue in NY N081177 (November 4, 2009) is described as a 5-In-1 portable power pack. It is identified within the product literature as ITEM 96157-1VGA. It contains a 12V, 17-amp hour rechargeable lead acid battery with dual 12V outlets. It has 36" jump-start cables with copper-plated clamps, a 260 PSI air compressor with gauge, a 400-watt power inverter with dual AC outlets, an LED map light, AC and DC power ports and a battery level indicator. The 5-In-1 portable power pack is housed in a heavy-duty rubberized case. This product is used in automobiles, on boats, and other types of vehicles to provide battery power to dead batteries, cell phones, and other devices that require power. It can also be used to inflate tires, and recreation inflatables, such as sports balls. The LED light can be used to read a map or for emergency lighting.

¹ Although not explicitly indicated in NY R04727, our research indicates that the JNS 1800 device contains a rechargeable, sealed lead-acid storage battery. See <https://www.batteryspec.com/cgi-bin/cart.cgi?action=link&product=67G1103&uid=8> (last visited June 2, 2022).

² Although not explicitly indicated in NY R04727, the user manual for the VEC026BD device states that the device contains a rechargeable, sealed lead-acid storage battery.

³ Although not explicitly indicated in NY N034766, the user manual for the VEC012CBD device states that the device contains a rechargeable, sealed lead-acid storage battery.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. The HTSUS provisions under consideration are as follows:

- 8504 Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof:
- 8507 Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof:

Note 3 to Section XVI, HTSUS, of which headings 8504 and 8507, HTSUS, are a part, provides that:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The EN to heading 8504, HTSUS, states, in pertinent part, the following:

The apparatus of this group are used to convert electrical energy in order to adapt it for further use. They incorporate converting elements (e.g., valves) of different types. They may also incorporate various auxiliary devices (e.g., transformers, induction coils, resistors, command regulators, etc.). Their operation is based on the principle that the converting elements act alternatively as conductors and non-conductors.

The fact that these apparatus often incorporated auxiliary circuits to regulate the voltage of the emerging current does not affect their classification in this group, nor does the fact that they are sometimes referred to as voltage or current regulators.

This group includes: ...

(D) Direct current converters by which direct current is converted to a different voltage...

This heading also includes stabilized suppliers (rectifiers combined with a regulator), e.g., uninterruptible power supply units for a range of electronic equipment.

The EN to heading 8507, HTSUS, states, in pertinent part, the following:

Electric accumulators (storage batteries or secondary batteries) are characterized by the fact that the electrochemical action is reversible so that the accumulator may be recharged. They are used to store electricity and

supply it when required. A direct current is passed through the accumulator producing certain chemical changes (charging); when the terminals of the accumulator are subsequently connected to an external circuit these chemical changes reverse and produce a direct current in the external circuit (discharging). This cycle of operations, charging and discharging, can be repeated for the life of the accumulator.

Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container. Accumulators may be of the wet or dry cell type...

Accumulators are used for supplying current for a number of purposes, e.g., motor vehicles, golf carts, fork-lift trucks, power hand-tools, cellular telephones, portable automatic data processing machines, portable lamps....

Accumulators containing one or more cells and the circuitry to interconnect the cells amongst themselves, often referred to as “battery packs”, are covered by this heading, whether or not they include any ancillary components which contribute to the accumulator’s function of storing and supplying energy, or protect it from damage, such as electrical connectors, temperature control devices (e.g., thermistors), circuit protection devices, and protective housings. They are classified in this heading even if they are designed for use with a specific device.

The devices of the subject rulings NY R04727, NY N005077, NY N034766 and NY N081177, were each classified as static converters of heading 8504, HTSUS. In HQ H176833 (November 17, 2011), CBP defined a “static converter” as:

... [a] unit that employs solid state devices such as semiconductor rectifiers or controlled rectifiers (thyristors), gated power transistors, electron tubes, or magnetic amplifiers to change ac power to dc power, dc power to ac power, or fixed frequency ac power to variable frequency ac power.” According to EN 85.04(II), a static converter is “used to convert electrical energy in order to adapt it for further use.” EN 85.04(II) further states that rectifiers, inverters, alternating current converters, cycle converters and direct current converters are all examples of static converters.

See also *ENI Technology Inc. v. United States*, 641 F. Supp. 2d 1337, 1353–1354 (Ct. Int’l Trade 2009), citing *The Authoritative Dictionary of IEEE Standards Terms* (IEEE 100) 912, 1103 (7th ed. 2000).

Heading 8507, HTSUS, provides for “Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof.” Electric accumulators of the heading, which the ENs specifically call storage batteries or secondary batteries, are characterized by the fact that the electrochemical action is reversible so that the accumulator may be recharged. Furthermore, the merchandise of the heading is used to store electricity and supply it when required, and functions by way of a direct current passing through the accumulator and producing certain chemical changes (i.e., the charging function of the battery itself). When the terminals

of the accumulator are later connected to an external circuit, these chemical changes reverse and produce a direct current in the external circuit (i.e., the charging of the device to which it is connected). This cycle of operations, charging and discharging, can be repeated for the life of the accumulator.

Each device under consideration is capable of performing multiple functions (such as jump-starting vehicles and providing power and lighting, and also functioning as an inflator in one case), with each function provided for under a different heading, e.g., headings 8504 or 8507, HTSUS. As such, the devices meet the terms of Note 3 to Section XVI, HTSUS, because each device is designed for the purpose of performing two or more complementary or alternative functions, and each device is therefore classified according to the device's principal function.

With respect to the devices' principal functions, we note that none of the functions, e.g., the provision of power for external devices, lighting, or jump-starting motor vehicles or inflating tires, would be possible without the devices' ability to store power or serve as a battery. Ultimately, we conclude that the principal function is indeed to maintain an independent source of electricity to use for one of these other secondary purposes. The subject merchandise is properly classified under heading 8507, HTSUS.

We note that the instant merchandise differs from products that merely serve to charge other devices but lack a battery. These products are properly classified under heading 8504, HTSUS. *See, e.g.*, NY N018172 (October 31, 2007). The classification of the instant composite portable storage batteries, on the other hand, is consistent with prior CBP rulings. *See, e.g.*, HQ H070632 (January 10, 2011) (classifying lithium-ion cell phone battery packs in heading 8507, HTSUS); HQ 966268 (May 21, 2003) (classifying battery packs for cell phones in heading 8507, HTSUS, and holding that battery packs are "essentially electric storage batteries"). *See also* HQ 966328 (March 31, 2003); HQ H176833 (November 17, 2011); HQ H155376 (June 22, 2011); HQ 963870 (July 14, 2000); HQ H136116 (March 2, 2011); NY N152037 (April 1, 2011); NY N240050 (April 18, 2013).

HOLDING:

By application of GRI 1 (Note 3 to Section XVI), the subject composite portable storage batteries are classifiable under heading 8507, HTSUS. Specifically, by application of GRI 6, they are classifiable under subheading 8507.20.80, HTSUS, which provides for "Electric storage batteries, including separators therefor, whether or not rectangular (including square); parts thereof: Other lead-acid storage batteries: Other." The column one, general rate of duty is 3.5% *ad valorem*. Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY H82059 (June 28, 2001), NY R04727 (September 14, 2006), NY N005077 (January 23, 2007), NY N034766 (August 12, 2008) and NY N081177 (November 4, 2009) are hereby revoked.

To the extent that the devices subject to this ruling are products of China, note that pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8507.20.80, HTSUS, unless specifically excluded, are subject to an additional xx percent *ad valorem* rate

of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.03, in addition to subheading 8507.20.80, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective dates, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china> respectively.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 22–70

ADEE HONEY FARMS, et al., Plaintiffs, v. UNITED STATES, et al.,
Defendants.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 16–00127

[Denying motions of plaintiffs for judgment on the agency record]

Dated: June 16, 2022

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Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the submissions were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION

Stanceu, Judge:

Plaintiffs are domestic producers of honey, crawfish, garlic, or mushrooms that qualified as “affected domestic producers” (“ADPs”) entitled to receive certain cash distributions under the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs received annual distributions resulting from the government’s collection of duties assessed and collected upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

In this litigation, plaintiffs claim that the U.S. Customs Service, now U.S. Customs and Border Protection (“Customs” or “CBP”), unlawfully failed to include in their distributions interest assessed after liquidation (“delinquency interest”) that pertained to collected anti-dumping or countervailing duties.

Before the court are plaintiffs’ motions for judgment on the agency record under USCIT Rule 56.1, in which they argue that CBP’s refusal to include the delinquency interest in their distributions was contrary to the Byrd Amendment and seek judgments for payment of the interest they claim they should have received. Because plaintiffs have not demonstrated their entitlement to these judgments, the court denies their motions.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion and Order granting defendants’ motion to dismiss in part and denying it in part. *See Adee Honey Farms v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1365, 1367–1370 (2020) (“*Adee Honey Farms I*”).

Various plaintiffs commenced separate actions on July 15, 2016,² which the court consolidated on September 20, 2016. Order (Sept. 21, 2016), ECF No. 13. After consolidation, defendants filed a motion to dismiss. *Defs.’ Mot. to Dismiss* (Jan. 9, 2017), ECF No. 19. On February 6, 2017, plaintiffs filed four amended complaints. First Am.

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

² Summons, Ct. No. 16–00127, ECF No. 1; Compl., Ct. No. 16–00127, ECF No. 2; Summons, Ct. No. 16–00129, ECF No. 1; Compl., Ct. No. 16–00129, ECF No. 2; Summons, Ct. No. 16–00130, ECF No. 1; Compl., Ct. No. 16–00130, ECF No. 2; Summons, Ct. No. 16–00131, ECF No. 1; Compl., Ct. No. 16–00131, ECF No. 2.

Compl. of Adee Honey Farms, et al., Ct. No. 16–00127, ECF No. 22; First Am. Compl. of Christopher Ranch, LLC, et al., Ct. No. 16–00129, ECF No. 24; First Am. Compl. of Monterey Mushrooms, Inc., Ct. No. 16–00130, ECF No. 25; First Am. Compl. of A&S Crawfish, et al., Ct. No. 16–00131, ECF No. 23.

On June 1, 2020, this court issued its Opinion and Order in *Adee Honey Farms I*, ruling that plaintiffs’ claims seeking delinquency interest on any CDSOA distributions received prior to July 15, 2014 were untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i). *Adee Honey Farms I*, 44 CIT at __, 450 F. Supp. 3d at 1378.³

On May 24, 2021, the plaintiffs other than Monterey Mushrooms, Inc. (“Monterey Mushrooms”) filed a joint motion for judgment on the agency record and accompanying brief. Pls.’ Rule 56.1 Mot. for J. on the Agency R., ECF No. 114; Mem. in Supp. of Pls.’ Rule 56.1 Mot. for J. on the Agency R., ECF No. 115 (“Pls.’ Br.”). The same day, Monterey Mushrooms filed its own motion for judgment on the agency record. Pl. Monterey Mushrooms, Inc.’s Rule 56.1 Mot. for J. on the Agency R., ECF No. 113; Pl. Monterey Mushrooms, Inc.’s Br. in Supp. of Mot. for J. on the Agency R., ECF No. 113–1 (“Monterey Mushrooms’ Br.”).

On August 9, 2021, the government responded in opposition to the plaintiffs’ motions. Defs.’ Resp. to Pls.’ Rule 56.1 Mot. for J. on the Agency R., ECF No. 122; Defs.’ Resp. to Pl.’s, Monterey Mushrooms, Inc., Br. in Supp. of Mot. for J. on the Agency R., ECF No. 123. Plaintiffs replied on October 8, 2021. Pl. Monterey Mushrooms, Inc.’s Reply Br., ECF No. 126; Reply in Supp. of Pls.’ Rule 56.1 Mot. for J. on the Agency R., ECF No. 127.

On October 14, 2021, plaintiffs filed consent motions for oral argument. Consent Mot. for Oral Arg., ECF No. 128; Pls.’ Consent Mot. for Oral Arg., ECF No. 129.

II. DISCUSSION

A. Subject Matter Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i). Subparagraph (1)(B) of § 1581(i) grants this court jurisdiction of any civil action “that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue,” and subparagraph

³ Plaintiff Monterey Mushrooms, Inc.’s motion to reconsider the court’s ruling in *Adee Honey Farms v. United States*, 44 CIT __, 450 F. Supp. 3d 1365 (2020) was denied in a prior Opinion and Order issued by the court. *Adee Honey Farms v. United States*, 46 CIT __, Slip Op. No. 22–60 (June 8, 2022).

(1)(D) of § 1581(i) provides this court jurisdiction of any civil action “that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph”

As directed by 28 U.S.C. § 2640(e), the court “shall review the matter as provided in section 706 of title 5.” The latter provision, of the Administrative Procedure Act, directs the court, *inter alia*, to “hold unlawful and set aside agency action, findings, and conclusions found to be— . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

B. “Continued Dumping and Subsidy Offsets” under the Byrd Amendment

The CDSOA, 19 U.S.C. § 1675c, enacted in October 2000 and repealed in February 2006,⁴ amended the Tariff Act of 1930 (“Tariff Act”) to direct Customs to distribute funds from assessed antidumping and countervailing duties to ADPs on a federal fiscal year basis, as compensation for certain qualifying expenditures. 19 U.S.C. § 1675c(a). The CDSOA defined an “affected domestic producer” generally as a “manufacturer, producer, farmer, rancher, or worker representative” that was a “petitioner or interested party in support of the petition with respect to which an antidumping duty . . . or a countervailing duty order has been entered” and that “remains in operation.” *Id.* § 1675c(b)(1). The annual distribution an ADP received was identified in the CDSOA “as the ‘continued dumping and subsidy offset.’” *Id.* § 1675c(a).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of an antidumping duty or countervailing duty petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2).

The CDSOA prescribed a detailed procedure by which Customs was to retain antidumping and countervailing duties and distribute them annually to ADPs. Customs was directed to establish a “special ac-

⁴ Under the terms of the 2006 legislation repealing the CDSOA, Customs is to distribute antidumping and countervailing duties assessed on entries made before October 1, 2007, subject to certain limitations imposed in 2010. See Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4, 154 (2006), amended by Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064, 3163, amended by Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, 124 Stat. 3296, 3308 (current version at 19 U.S.C. § 1675c note).

count” in the U.S. Treasury for each then-existing and future AD or CVD order, into which it was to deposit all antidumping and countervailing duties “assessed” under such order, after the effective date of the CDSOA. *Id.* § 1675c(e). Customs was directed to distribute to ADPs, each federal fiscal year on a pro-rata basis, the “funds” from the assessed duties for the respective AD or CVD order that were “received in the preceding fiscal year,” based on each ADP’s certification of “new and remaining qualifying expenditures.” *Id.* § 1675c(d)(3). Distributions were required to occur within 60 days following the first day of the fiscal year. *See id.* § 1675c(c).

C. Implementation of the CDSOA by Customs

Following notice and comment on a proposed rule, Customs promulgated a final rule to prescribe “administrative procedures, including the time and manner, under which antidumping and countervailing duties assessed on imported products would be distributed to affected domestic producers as an offset for certain qualifying expenditures.” *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546, 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)); *see* 19 U.S.C. § 1675c(c) (“the Commissioner [of Customs] shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section.”), (e)(3) (“Consistent with the requirements of subsections (c) and (d), the Commissioner [of Customs] shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.”).

In promulgating its regulations, Customs made several interpretations of the CDSOA. One example concerned the interpretation of the word “assessed” as it is used throughout the CDSOA to modify the word “duties.” The CDSOA refers to “duties assessed” pursuant to a countervailing or antidumping duty order, *id.* § 1675c(a), and imposes the parallel requirements to deposit into the special accounts all “duties . . . that are assessed” under such an order, *id.* § 1675c(e)(2), and to distribute annually to ADPs “all funds . . . from assessed duties,” *id.* § 1675c(d)(3). Customs interpreted these references to mean antidumping and countervailing duties that are “assessed” at liquidation and collected by Customs, both as estimated duties deposited with Customs upon or soon after entry, and as payments of any additional amounts owing following liquidation of that entry. *See* 19 C.F.R. § 159.64. The interpretation of the word “assessed” to refer

to duties assessed at liquidation, and collected by Customs both before and after liquidation, is not challenged in this litigation.⁵

Also unchallenged in this litigation is a decision by Customs to establish “Clearing Accounts,” a procedural measure not mentioned in the CDSOA, which directs the creation of only the Special Accounts. Customs designated the Clearing Accounts for the deposit of estimated antidumping and countervailing duties, *id.* § 159.64(a)(2), reserving the Special Accounts for the transfer from the Clearing Accounts of antidumping duties and countervailing duties “when an entry upon which antidumping or countervailing duties are owed is properly liquidated pursuant to an order, finding or receipt of liquidation instructions,” *id.* § 159.64(b)(1)(ii).

The dispute in this case arose instead from the interpretation that Customs, upon promulgating its implementing regulations, gave to a provision of the CDSOA—the “Deposits into Accounts” provision—with respect to the treatment of interest earned by the government on antidumping and countervailing duties. As discussed in further detail below, Customs interpreted this provision as requiring it to deposit into the Special Accounts the interest the government earned on underpaid deposits of estimated antidumping and countervailing duties that was assessed at liquidation and later collected. Customs did not place into the Special Accounts any interest the government earned that was assessed and collected after liquidation of the entries. The issue presented in this litigation is whether that interpretation was a permissible one. As discussed below, the court concludes that it was.

D. The Interpretation of the “Deposits into Accounts” Provision of the CDSOA Adopted by Section 159.64(e) of the Customs Regulations

The Byrd Amendment provision directly at issue in this litigation reads as follows:

DEPOSITS INTO ACCOUNTS.—The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including *interest earned on* such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

⁵ The court does not suggest or imply that the agency’s interpretation of “assessed” to mean “assessed and collected” is unreasonable. The contrary interpretation would result in deposits from the U.S. Treasury into the Special Accounts of amounts not collected, or not yet collected, from importers. Moreover, the statute, in a provision on the termination of a Special Account, refers to the time that “all entries relating to the order or finding are liquidated and duties assessed *collected*.” 19 U.S.C. § 1675c(e)(4)(B) (emphasis added).

19 U.S.C. § 1675c(e)(2) (emphasis added). In promulgating and administering its implementing regulations, Customs interpreted the term “including interest earned on such duties” to mean that it would deposit into the Special Accounts the interest on underpayments of antidumping and countervailing duties that the government earns up until the time of liquidation of the entry, and determines as a fixed amount upon liquidation, but not any “delinquency” interest it earns on the entry thereafter.⁶ The implementing regulations expressed this decision as follows:

Interest on Special Accounts and Clearing Accounts. In accordance with Federal appropriations law, and Treasury guidelines on Special Accounts, funds in such accounts are not interest-bearing unless specified by Congress. Likewise, funds being held in Clearing Accounts are not interest-bearing unless specified by Congress. Therefore, no interest will accrue in these accounts. However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer.

19 C.F.R. § 159.64(e). The narrow question presented by this litigation is whether the phrase “including interest earned on such duties” as used in the Deposits into Accounts provision, 19 U.S.C. § 1675c(e)(2), is permissibly interpreted to allow Customs to deposit into the Special Accounts only “interest charged on antidumping and countervailing duties *at liquidation*,” 19 C.F.R. § 159.64(e) (emphasis added).⁷

E. Judicial Review of Statutory Interpretations by Agencies to Which Congress Delegated Rulemaking Authority

When a government agency promulgates a rule interpreting a provision within a statutory scheme the agency is entrusted by Congress to administer, the court proceeds according to the Supreme Court’s analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Coun-*

⁶ Prior to 2016, Customs deposited interest assessed at liquidation on underpaid deposits of antidumping and countervailing duties, but not interest accruing after liquidation, into the special accounts for distributions made to affected domestic producers under the CDSOA. Defs.’ Mot. to Dismiss 4 (Jan. 9, 2017), ECF No. 19. In 2016, Congress required specified types of interest paid on a bond or by a surety, including interest accruing after liquidation, to be included in CDSOA distributions. Congress did not address the question of interest other than interest paid on a bond or by a surety, nor did it make the provision retroactive. See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 122, 187–88 (2016) (“TFTEA”). All CDSOA distributions at issue in this Opinion and Order occurred prior to the 2016 enactment of TFTEA.

⁷ The decision by the U.S. Customs Service that the Special Accounts and Clearing Accounts would not bear interest, which Customs combined in 19 C.F.R. § 159.64(e) with its decision on the interest it would deposit on assessed duties, is not contested in this litigation.

cil, Inc., 467 U.S. 837, 843–46 (1984) (“*Chevron*”). As *Chevron* instructed, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43 (footnote omitted). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9. For a *Chevron* “step one” analysis, “traditional tools of statutory construction,” *id.*, include the examination of the statutory text and structure and the legislative history. *See, e.g., Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1303, 1312–14 (Fed. Cir. 2017) (en banc); *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017), *cert. denied*, 138 S.Ct. 690 (2018) (“We may find Congress has expressed unambiguous intent by examining the statute’s text, structure, and legislative history, and apply the relevant canons of interpretation.”) (internal quotations and citations omitted); *Kyocera Solar, Inc. v. U.S. Int’l Trade Comm’n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016). If the intent of Congress is not clear, the court, under “step two” of a *Chevron* analysis, must accept the agency’s interpretation of the statute if it is reasonable and “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron*, 467 U.S. at 844 (footnote omitted).

F. CDSOA Provisions Addressing Interest “Earned on” Assessed AD and CVD Duties and “Funds” from Such Assessed Duties

The court begins with the text of the provision directly at issue. *See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”). In the Deposits into Accounts provision, Congress directed Customs to deposit into the Special Accounts “all antidumping or countervailing duties (including *interest earned on* such duties) that are assessed” under an AD or CVD order. 19 U.S.C. § 1675c(e)(2) (emphasis added). In speaking broadly of interest “earned on” these duties, the provision addresses *whether* interest is earned on the duties and does not distinguish as to *when* interest is earned. In that respect, the plain meaning of the phrase “interest earned on such

duties,” at first blush, does not favor the agency’s interpretation.⁸ Nevertheless, the provision is not free of ambiguity. Understanding the meaning of the words “interest earned on such duties” requires consideration of other provisions of the Tariff Act, which govern how antidumping and countervailing duties earn interest for the government. Congress must be presumed to have been aware, also, that upon liquidation, Customs combines underpaid duties, taxes, fees, and accrued interest to calculate a single amount that is owed by the importer of record on the entry as a whole. *See* 19 U.S.C. § 1505(b), (c). Thus, once all duties, taxes, fees, and interest owed upon an entry for consumption are “liquidated,” i.e., reduced to a single sum to which certain aspects of finality have attached, the individual amounts of the various duties, taxes, fees, and interest might be seen as having lost their individual character as a result of the liquidation process. Under that reasoning, Congress could have considered the interest accruing on an entry after liquidation to be accruing on the entry as a whole and not on those individual amounts.

One other provision of the CDSOA, the “Distribution of Funds” provision, also mentions interest “earned.” This provision does not resolve the ambiguity surrounding the issue of whether interest accruing on delinquent amounts after the liquidation process is completed is interest that is “earned” within the intended meaning of the CDSOA. The first sentence of the Distribution of Funds provision reads as follows:

DISTRIBUTION OF FUNDS.—The Commissioner shall distribute all funds (including *all interest earned on the funds*) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2).

Id. § 1675c(d)(3) (emphasis added). While it is plausible to interpret the phrase “all interest earned on the *funds*” to refer only to interest earned on the Special Accounts (of which interest, Customs concluded, there could be none), as opposed to interest earned on underpaid duties, this is not the only possible interpretation. *Id.* (emphasis

⁸ Defendants argue that the words “are assessed” as used in 19 U.S.C. § 1675c(e)(2) limit the scope of the provision to interest that is “assessed” at liquidation, not interest that accrues thereafter. Defs.’ Resp. to Pls.’ Rule 56.1 Mot. for J. on the Agency R. 16–19 (Aug. 9, 2021), ECF No. 122; Defs.’ Resp. to Consolidated Pl.’s, Monterey Mushrooms, Inc., Br. in Supp. of Mot. for J. on the Agency R. 16–19 (Aug. 9, 2021), ECF No. 123. The court disagrees. The wording does not support defendants’ interpretation: “The Commissioner shall deposit into the special accounts, all antidumping or countervailing *duties* (including interest earned on such duties) that *are assessed*” 19 U.S.C. § 1675c(e)(2) (emphasis added). The subject of the sentence containing the predicate “are assessed” is the plural term “duties,” not the singular term “interest.” An interpretation that accords with plain meaning should not dispense with agreement between subject and verb.

added). In the same provision, Congress referred to “funds . . . *from assessed duties* received in the preceding fiscal year.” *Id.* (emphasis added). Also, Congress used the term “funds *in* a special account” in referring to what is to be distributed to ADPs, *id.* § 1675c(e)(3) (emphasis added), suggesting that the word “funds” refers to what is in a Special Account as opposed to the Special Account itself. When read in conjunction with the Deposits into Accounts provision, the Distribution of Funds provision is reasonably interpreted to address the distribution of the duties, and the interest earned thereon, that are deposited into the Special Accounts according to the Deposits into Accounts provision.

In summary, the Deposits into Accounts and Distribution of Funds provisions indicate congressional intent that Customs would: (1) deposit into the Special Accounts assessed antidumping and countervailing duties, *id.* § 1675c(e); (2) deposit also into the Special Accounts “interest,” *id.* § 1675c(e)(2), i.e., “all interest,” *id.* § 1675c(d)(3), earned on such “funds” or “duties”; and (3) distribute to ADPs all funds from assessed duties, together with all interest earned thereon, received in the preceding fiscal year, *id.* Although the CDSOA sets forth in some detail the procedures for distribution of “continued dumping and subsidy offsets,” neither the Deposits into Accounts provision nor the Distribution of Funds provision defines precisely what is meant by the use of the term “interest earned on such duties” or the term “all interest earned on the funds,” respectively. Therefore, the court looks beyond the CDSOA to other Tariff Act provisions that affect how antidumping and countervailing duties earn interest for the government for an indication of what Congress may have meant in using the term “interest earned.”

G. Tariff Act Provisions on the Government’s Earning of Interest on Countervailing and Antidumping Duties

The Trade Agreements Act of 1979 (the “TAA”) amended the Tariff Act to provide that underpayments on deposited antidumping and countervailing duties would earn interest for the government and that overpayments would earn interest for the importer. Pub. L. No. 96–39, 93 Stat. 144, 188–89. In its current form and in the form in which it relates to this litigation, Section 778(a) of the Tariff Act provides that “[i]nterest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order under this

subtitle”⁹ 19 U.S.C. § 1677g(a). The current requirement to deposit estimated countervailing and antidumping duties during the entry process appeared in related provisions of the TAA.¹⁰

At the time of the 1979 amendment, the Tariff Act, while requiring (in Section 505(a) thereof) the deposit of estimated duties “at the time of making entry,” did not provide for the assessment of interest, at the time of liquidation, on overpayments or underpayments of estimated ordinary (“normal”) customs duties. 19 U.S.C. § 1505 (1976). Nor did the Tariff Act, at that time, provide for interest on late payment of additional duties that Customs billed to the importer after the completion of the liquidation process. Under the 1979 amendment, therefore, the interest described in Section 778(a), 19 U.S.C. § 1677g(a), began accruing when the estimated antidumping or countervailing duties were required to be deposited, and it stopped accruing upon liquidation of the entry. Customs implemented the CDSOA so as to deposit this “liquidated” interest and include it in the annual distributions to the ADPs.

The authority for the “delinquency” interest plaintiffs seek in this litigation was added to the Tariff Act five years after the TAA. In the Trade and Tariff Act of 1984, Congress amended Section 505 of the Tariff Act to add a new subsection (then subsection (c)), which provided for “delinquency interest” on late payments of amounts Customs determined in the liquidation process to be owing. The new subsection read as follows:

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall

⁹ As originally enacted, the Trade Agreements Act of 1979 (the “TAA”) made the interest provision applicable on and after the date of notice of an affirmative injury/threat determination by the U.S. International Trade Commission. Pub. L. No. 96–39, 93 Stat. 144, 188–89. Congress amended the provision in the Trade and Tariff Act of 1984 to provide that the interest would be payable on and after the date of publication of a countervailing duty or antidumping duty order. Pub. L. No. 98–573, 98 Stat. 2948, 3039.

¹⁰ The related provisions in the TAA provided for cash deposits of estimated antidumping and countervailing duties, in procedures parallel to those of Section 505 of the Tariff Act, 19 U.S.C. § 1505, as in effect at the time for ordinary (“normal”) customs duties. The Tariff Act of 1930 provides for the deposit of estimated countervailing duties (in an amount determined by the International Trade Administration, Department of Commerce, not Customs) in section 706(a)(3), which requires, following publication of a countervailing duty order, “the deposit of estimated countervailing duties pending liquidation of entries of merchandise *at the same time as estimated normal customs duties on that merchandise are deposited.*” 19 U.S.C. § 1671e(a)(3) (emphasis added). A nearly identical provision, Section 736(a)(3) of the Tariff Act, requires, following publication of an antidumping duty order, “the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.” 19 U.S.C. § 1673e(a)(3).

be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

Pub. L. No. 98–573, 98 Stat. 2948, 2977 (1984). By regulation, the Treasury Secretary provided that underpayments would be charged interest at the interest rate set semiannually according to 26 U.S.C. § 6621 and compounded daily in accordance with 26 U.S.C. § 6622. *Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Custom Servs. May 29, 1985).

In the North American Free Trade Agreement Implementation Act (“NAFTA Implementation Act”), Congress amended Section 505 of the Tariff Act to provide for the accrual to the government of interest on underpayments of ordinary (“normal”) customs duties (as well as the accrual of interest to the importer of record of interest on any excess monies deposited). Pub. L. No. 103–182, 107 Stat. 2057, 2205 (1993). Subsection (a) of that section requires the importer of record to deposit with Customs “at the time of entry or such later time as the Secretary may prescribe by regulation (but not later than 12 working days after entry or release) the amount of duties and fees estimated to be payable on such merchandise.” 19 U.S.C. § 1505(a). Subsection (b) of the amended Section 505 directs Customs to collect “any increased or additional duties and fees due, together with interest thereon . . . as determined on a liquidation or reliquidation.” *Id.* § 1505(b). “Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment.” *Id.* In subsection (c) of section 505 as amended by the NAFTA Implementation Act, Congress specified the timing of the accrual of the interest the government earns from any underpayment of the deposit of estimated duties and fees required under subsection (a) of that section. According to the provision, “[i]nterest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.” 19 U.S.C. § 1505(c).

In the new Section 505(d), Congress retained the delinquency provision in more detailed form, providing that “[i]f duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [which begins with the issuance of the bill by Customs], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation

until the full balance is paid.” *Id.* § 1505(d). The provision adds that “[n]o interest shall accrue during the 30-day period in which payment is actually made.”¹¹ *Id.*

H. The Agency’s Interpretation of the Interest Provisions in the CDSOA Is Reasonable

The history of the interest provisions in Section 778(a) of the Tariff Act, 19 U.S.C. § 1677g, and Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d), and the effect of the liquidation process cause the court to conclude that the agency’s interpretation was reasonable.

As the court explained above, the statutory history indicates that Section 778(a) interest accrues from the date of required deposit to the date of liquidation, and not beyond that date, and that when Congress provided for Section 778(a) interest in 1979, the Tariff Act did not provide for delinquency interest, which Congress created five years later. Section 778(a) interest, unlike Section 505(d) interest, is unique to antidumping and countervailing duties. Interest on antidumping and countervailing duties accruing from the time of the required deposit to the liquidation of the entry and assessed at liquidation unambiguously can be described as interest earned *on* those duties. But the same cannot be said for interest that begins to accrue on the total amount owing on an already-liquidated entry. The concept of “liquidation” under the Tariff Act reinforces this conclusion.

Liquidation is the procedural step during which the amount the importer of record owes on the entry is “fixed,” i.e., becomes final for most purposes under the Tariff Act. *See* 19 U.S.C. §§ 1500, 1514. Although the Tariff Act provides for certain exceptions to this finality, *see, e.g., id.* §§ 1501 (reliquidation), 1592 (entry by means of fraud, gross negligence, or negligence), the basic principle is that the individual amounts of duties and fees (including the amount of antidumping or countervailing duties, together with any interest required to be assessed by 19 U.S.C. § 1677g) are “fixed,” i.e., ascertained, combined into a single sum, and billed to the importer of record.¹² While the specific amount of interest “earned on” underpaid antidumping and countervailing duties under Section 778(a) is “fixed” at the time of liquidation, no interest, and no portion of the interest, accruing under

¹¹ It appears that the amended delinquency provision conformed the statute to the implementing regulations for the then-existing provision. *See Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Customs Serv. May 29, 1985).

¹² Antidumping and countervailing duties, like ordinary duties, for most purposes are fixed at the time of liquidation of the entry. For example, the Tariff Act provides that judicial challenges brought under 19 U.S.C. § 1516a to the individual amount of antidumping or countervailing duties owing, as determined by the International Trade Administration, U.S. Department of Commerce, may no longer be brought after the entry is liquidated. *See* 19 U.S.C. § 1516a(e).

Section 505(d) can be described in this way. In light of this intricate statutory structure, the interest assessed under Section 505(d) reasonably may be viewed as interest owing on a combined, “liquidated” amount for the entry rather than interest “earned on” antidumping or countervailing duties *per se*. Therefore, it was reasonable for Customs to interpret the CDSOA as requiring the deposit and distribution of only that interest on antidumping and countervailing duties that was assessed at liquidation of the entry.

In the brief for plaintiffs (other than Monterey Mushrooms), it is argued that the words “all interest” as used in the Distribution of Funds provision are unambiguous and must be interpreted to include delinquency interest. These plaintiffs argue that Congress was aware that three different types of interest (Section 505(d) interest, interest under 19 U.S.C. § 580 accruing on late payments under surety bonds, and Section 778(a) interest) accrue on unpaid antidumping and countervailing duties and used the words “all interest” to describe these different types of interest. *See, e.g.*, Pls.’ Br. 21 (“ . . . ‘all’ has a broad, inclusive common meaning that is not compatible with the restrictive interpretation Customs has assigned to ‘interest’ under the CD-SOA.”). Monterey Mushrooms makes a similar argument. Monterey Mushrooms’ Br. 19–21.¹³

The court disagrees that the statute is unambiguous on the question of whether interest under Section 505(d) must be deposited and distributed. Contrary to the arguments the plaintiffs advance, the ambiguity stems not from the words “interest” or “all interest” but from the phrase “interest *earned on*,” which appears in both the Deposits into Accounts and Distribution of Funds provisions. The interest Congress had in mind must have been “earned on” assessed antidumping or countervailing duties, 19 U.S.C. § 1675c(e)(2), or earned on the “funds . . . from assessed duties,” *id.* § 1675c(d)(3). For the reasons the court has discussed, interest earned on a delinquent

¹³ Monterey Mushrooms, Inc. also argues that no deference is owed to the decision by Customs not to deposit and distribute delinquency interest because the implementing regulation is silent on this point. Pl. Monterey Mushrooms, Inc.’s Br. in Supp. of Mot. for J. on the Agency R. 21–27 (May 24, 2021), ECF No. 113–1 (“Monterey Mushrooms’ Br.”). This argument lacks merit. As the court ruled in *Adee Honey Farms v. United States*, 44 CIT ___, 450 F. Supp. 3d 1365 (2020), 19 C.F.R. § 159.64(e) provides for the deposit of Section 778(a) interest into the Special Accounts, mentioning no other type of interest, and the preamble to the regulation clarifies that no other type of interest will be deposited.

Monterey Mushrooms, Inc. makes the related argument that U.S. Customs and Border Protection (“Customs”) lacked statutory authority to make “substantive determinations” such as deciding what type of interest would be deposited. Monterey Mushrooms’ Br. 17. This argument is specious. Congress directed Customs to “prescribe procedures for distribution of the continued dumping or subsidies offset required by this section,” 19 U.S.C. § 1675c(c), and Customs could not do so without interpreting—in one way or another—what Congress meant when using, in the relevant CDSOA provisions, the ambiguous term “interest earned” on the duties or funds.

payment of an already-liquidated entry can be viewed as having been earned on the single, liquidated sum that is in arrears. As a result of the liquidation, this sum is a procedural step removed from the interest accruing under the only statutory provision, 19 U.S.C. § 1677g, that Congress directed specifically to interest earned on anti-dumping and countervailing duties.

III. CONCLUSION

Due to the ambiguity inherent in the words “earned on,” the court concludes that it must analyze the CDSOA according to step two of the analysis required by *Chevron*. Even were the court to conclude that plaintiffs’ interpretation of the statutory provisions is the more reasonable one (and it does not so conclude), still it would be required to accept the agency’s interpretation if that interpretation also is reasonable. *See Chevron*, 467 U.S. at 843. Customs is the agency Congress “entrusted” to administer not only the CDSOA but also the other provisions of the Tariff Act, i.e., the “statutory scheme,” defining how interest is earned on antidumping and countervailing duties. *Id.* (footnote omitted).

The court concludes that Customs reasonably interpreted the CD-SOA as requiring deposit into the Special Accounts only the interest on countervailing and antidumping duties accruing from the time of required deposit to liquidation of the entries. The Tariff Act establishes a direct connection between interest accruing under Section 778(a), 19 U.S.C. § 1677g, and the specific type of duties upon which it accrues and according to which it is determined upon liquidation. Under statutory language susceptible to more than one interpretation, it was reasonable for Customs to conclude that Congress specifically contemplated only this type of “interest” on “assessed” duties when enacting the CDSOA.

As the court also has discussed, the history and structure of the relevant Tariff Act provisions reveals that Section 778(a) interest, which is the only type of interest specific to antidumping and countervailing duties, stops accruing at liquidation. In contrast, Section 505(d) interest, which is not determined at liquidation, accrues on the amount Customs bills to an importer of record that is not paid (by the importer of record or its surety) within the 30-day period provided for in Section 505(c) of the Tariff Act. The components in the total sum consisting of underpaid antidumping or countervailing duties and the Section 778(a) interest thereon were assessed and billed to the importer, together with all other amounts owing, as a result of liquidation. Under the statutory scheme, considered on the whole, it was reasonable for Customs to view those components as having lost their

individual character as a result of the liquidation process. Consistent with the interpretation Customs adopted, interest “earned on” the antidumping and countervailing duties can be viewed as interest determined at liquidation to have accrued, i.e., “earned,” by the government on those specific duties, in an amount that stopped accruing at liquidation and was fixed upon liquidation.

Pursuant to USCIT Rule 56.1, the court will deny the motions for judgment on the agency record and enter judgment for defendants.

Dated: June 16, 2022

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–71

AMERICAN DREW, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 17–00086

[Denying motion of plaintiffs for judgment on the agency record]

Dated: June 16, 2022

J. Michael Taylor, King & Spalding LLP, of Washington, D.C., for plaintiffs American Drew, American of Martinsville, Basset Furniture Industries Inc., Carolina Furniture Works, Inc., Century Furniture LLC d/b/a Century Furniture Industries, Harden Furniture Inc., Johnston Tombigbee Furniture Mfg. Co., Kincaid Furniture Company Inc., L & J G Stickley, Inc., La-Z-Boy Caseloads, Inc., Lea Industries, MJ Wood Products, Inc.; Mobel Inc., Perdues Inc. d/b/a Perdue Woodworks Inc., Sandberg Furniture Mfg. Co., Inc., Stanley Furniture LLC (successor to Stanley Furniture Company, Inc.), T Copeland and Sons, Inc., Tom Seely Furniture LLC, Vaughan Bassett Furniture Company, Inc., Vermont Quality Wood Products, LLC, Webb Furniture Enterprises, Inc. With him on the submissions were *Jeffrey M. Telep*, *Jeremy M. Bylund*, and *Neal J. Reynolds*.

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the submission were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION

Stanceu, Judge:

Plaintiffs American Drew, American of Martinsville, Basset Furniture Industries Inc., Carolina Furniture Works, Inc., Century Furniture LLC d/b/a Century Furniture Industries, Harden Furniture Inc.,

Johnston Tombigbee Furniture Mfg. Co., Kincaid Furniture Company Inc., L & J G Stickley, Inc., La-Z-Boy Casegoods, Inc., Lea Industries, MJ Wood Products, Inc., Mobel Inc., Perdues Inc. d/b/a Perdue Woodworks Inc., Sandberg Furniture Mfg. Co., Inc., Stanley Furniture LLC, T Copeland and Sons, Inc., Tom Seely Furniture LLC, Vaughan Bassett Furniture Company, Inc., Vermont Quality Wood Products, LLC, and Webb Furniture Enterprises, Inc. are domestic producers of wooden bedroom furniture that qualified as “affected domestic producers” (“ADPs”) entitled to receive certain cash distributions under the Continued Dumping and Subsidy Offset Act of 2000 (the “CD-SOA” or “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs received annual distributions resulting from the government’s collection of duties assessed and collected upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

In this litigation, plaintiffs claim that the U.S. Customs Service, now U.S. Customs and Border Protection (“Customs” or “CBP”), unlawfully failed to include in their distributions interest assessed after liquidation (“delinquency interest”) that pertained to collected antidumping or countervailing duties.

Before the court is plaintiffs’ motion for judgment on the agency record under USCIT Rule 56.1, in which they argue that CBP’s refusal to include the delinquency interest in their distributions was contrary to the Byrd Amendment and seek judgments for payment of the interest they claim they should have received. Because plaintiffs have not demonstrated their entitlement to these judgments, the court denies their motion.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion and Order granting defendants’ motion to dismiss in part and denying it in part. *See American Drew v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1378, 1380–82 (2020) (“*American Drew I*”).

Plaintiffs commenced this action on April 18, 2017. Summons, ECF No. 1; Compl., ECF No. 5.

Defendants filed their motion to dismiss on September 12, 2018. Defs.’ Mot. to Dismiss, ECF No. 19.

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

On June 1, 2020, this court issued its Opinion and Order finding that plaintiffs' claims seeking Section 1505(d) interest on any CDSOA distributions received prior to April 18, 2015, were untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i). *American Drew I*, 44 CIT at __, 450 F. Supp. at 1390.²

On May 24, 2021, all plaintiffs joined in a motion for judgment on the agency record and accompanying brief. Pls.' Mot. for J. on the Agency R. and for Recons., ECF No. 81 ("Pls.' Br."). On August 9, 2021, the government filed responses to plaintiffs' motion. Defs.' Resp. to Pls.' Mot. for J. on the Agency R. and for Recons., ECF No. 88. On October 8, 2021, plaintiffs filed their reply. Reply in Supp. of Pls.' Rule 56.1 Mot. for J. on the Admin. R. and for Recons., ECF No. 92.

Plaintiffs filed a consent motion for oral argument on October 15, 2021. Pls.' Consent Mot. for Oral Arg., ECF No. 93.

II. DISCUSSION

A. Subject Matter Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i). Subparagraph (1)(B) of § 1581(i) grants this court jurisdiction of any civil action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and subparagraph (1)(D) of § 1581(i) provides this court jurisdiction of any civil action "that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph . . ."

As directed by 28 U.S.C. § 2640(e), the court "shall review the matter as provided in section 706 of title 5." The latter provision, of the Administrative Procedure Act, directs the court, *inter alia*, to "hold unlawful and set aside agency action, findings, and conclusions found to be— . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

B. "Continued Dumping and Subsidy Offsets" under the Byrd Amendment

The CDSOA, 19 U.S.C. § 1675c, enacted in October 2000 and repealed in February 2006,³ amended the Tariff Act of 1930 ("Tariff

² Plaintiffs' motion to reconsider the court's ruling in *American Drew v. United States*, 44 CIT __, 450 F. Supp. 3d 1378 (2020) was denied in a prior Opinion and Order issued by the court. *American Drew v. United States*, 46 CIT __, Slip Op. No. 22-61 (June 8, 2022).

³ Under the terms of the 2006 legislation repealing the CDSOA, Customs is to distribute antidumping and countervailing duties assessed on entries made before October 1, 2007,

Act”) to direct Customs to distribute funds from assessed antidumping and countervailing duties to ADPs on a federal fiscal year basis, as compensation for certain qualifying expenditures. 19 U.S.C. § 1675c(a). The CDSOA defined an “affected domestic producer” generally as a “manufacturer, producer, farmer, rancher, or worker representative” that was a “petitioner or interested party in support of the petition with respect to which an antidumping duty . . . or a countervailing duty order has been entered” and that “remains in operation.” *Id.* § 1675c(b)(1). The annual distribution an ADP received was identified in the CDSOA “as the ‘continued dumping and subsidy offset.’” *Id.* § 1675c(a).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of an antidumping duty or countervailing duty petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2). The CDSOA prescribed a detailed procedure by which Customs was to retain antidumping and countervailing duties and distribute them annually to ADPs. Customs was directed to establish a “special account” in the U.S. Treasury for each then-existing and future AD or CVD order, into which it was to deposit all antidumping and countervailing duties “assessed” under such order, after the effective date of the CDSOA. *Id.* § 1675c(e). Customs was directed to distribute to ADPs, each federal fiscal year on a pro-rata basis, the “funds” from the assessed duties for the respective AD or CVD order that were “received in the preceding fiscal year,” based on each ADP’s certification of “new and remaining qualifying expenditures.” *Id.* § 1675c(d)(3). Distributions were required to occur within 60 days following the first day of the fiscal year. *See id.* § 1675c(c).

C. Implementation of the CDSOA by Customs

Following notice and comment on a proposed rule, Customs promulgated a final rule to prescribe “administrative procedures, including the time and manner, under which antidumping and countervailing duties assessed on imported products would be distributed to affected domestic producers as an offset for certain qualifying expen-

subject to certain limitations imposed in 2010. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4, 154 (2006), *amended by* Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064, 3163, *amended by* Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, 124 Stat. 3296, 3308 (current version at 19 U.S.C. § 1675c note).

ditures.” *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546, 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)); see 19 U.S.C. § 1675c(c) (“the Commissioner [of Customs] shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section.”), (e)(3) (“Consistent with the requirements of subsections (c) and (d), the Commissioner [of Customs] shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.”).

In promulgating its regulations, Customs made several interpretations of the CDSOA. One example concerned the interpretation of the word “assessed” as it is used throughout the CDSOA to modify the word “duties.” The CDSOA refers to “duties assessed” pursuant to a countervailing or antidumping duty order, *id.* § 1675c(a), and imposes the parallel requirements to deposit into the special accounts all “duties . . . that are assessed” under such an order, *id.* § 1675c(e)(2), and to distribute annually to ADPs “all funds . . . from assessed duties,” *id.* § 1675c(d)(3). Customs interpreted these references to mean antidumping and countervailing duties that are “assessed” at liquidation and collected by Customs, both as estimated duties deposited with Customs upon or soon after entry, and as payments of any additional amounts owing following liquidation of that entry. See 19 C.F.R. § 159.64. The interpretation of the word “assessed” to refer to duties assessed at liquidation, and collected by Customs both before and after liquidation, is not challenged in this litigation.⁴

Also unchallenged in this litigation is a decision by Customs to establish “Clearing Accounts,” a procedural measure not mentioned in the CDSOA, which directs the creation of only the Special Accounts. Customs designated the Clearing Accounts for the deposit of estimated antidumping and countervailing duties, *id.* § 159.64(a)(2), reserving the Special Accounts for the transfer from the Clearing Accounts of antidumping duties and countervailing duties “when an entry upon which antidumping or countervailing duties are owed is properly liquidated pursuant to an order, finding or receipt of liquidation instructions,” *id.* § 159.64(b)(1)(ii).

The dispute in this case arose instead from the interpretation that Customs, upon promulgating its implementing regulations, gave to a provision of the CDSOA—the “Deposits into Accounts” provision—

⁴ The court does not suggest or imply that the agency’s interpretation of “assessed” to mean “assessed and collected” is unreasonable. The contrary interpretation would result in deposits from the U.S. Treasury into the Special Accounts of amounts not collected, or not yet collected, from importers. Moreover, the statute, in a provision on the termination of a Special Account, refers to the time that “all entries relating to the order or finding are liquidated and duties assessed *collected*.” 19 U.S.C. § 1675c(e)(4)(B) (emphasis added).

with respect to the treatment of interest earned by the government on antidumping and countervailing duties. As discussed in further detail below, Customs interpreted this provision as requiring it to deposit into the Special Accounts the interest the government earned on underpaid deposits of estimated antidumping and countervailing duties that was assessed at liquidation and later collected. Customs did not place into the Special Accounts any interest the government earned that was assessed and collected after liquidation of the entries. The issue presented in this litigation is whether that interpretation was a permissible one. As discussed below, the court concludes that it was.

D. The Interpretation of the “Deposits into Accounts” Provision of the CDSOA Adopted by Section 159.64(e) of the Customs Regulations

The Byrd Amendment provision directly at issue in this litigation reads as follows:

DEPOSITS INTO ACCOUNTS.—The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including *interest earned on* such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

19 U.S.C. § 1675c(e)(2) (emphasis added). In promulgating and administering its implementing regulations, Customs interpreted the term “including interest earned on such duties” to mean that it would deposit into the Special Accounts the interest on underpayments of antidumping and countervailing duties that the government earns up until the time of liquidation of the entry, and determines as a fixed amount upon liquidation, but not any “delinquency” interest it earns on the entry thereafter.⁵ The implementing regulations expressed this decision as follows:

Interest on Special Accounts and Clearing Accounts. In accordance with Federal appropriations law, and Treasury guidelines

⁵ Prior to 2016, Customs deposited interest assessed at liquidation on underpaid deposits of antidumping and countervailing duties, but not interest accruing after liquidation, into the special accounts for distributions made to affected domestic producers under the CDSOA. Defs.’ Mot. to Dismiss 3–5 (Sept. 12, 2018), ECF No. 19. In 2016, Congress required specified types of interest paid on a bond or by a surety, including interest accruing after liquidation, to be included in CDSOA distributions. Congress did not address the question of interest other than interest paid on a bond or by a surety, nor did it make the provision retroactive. See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 122, 187–88 (2016) (“TFTEA”). All CDSOA distributions at issue in this Opinion and Order occurred prior to the 2016 enactment of TFTEA.

on Special Accounts, funds in such accounts are not interest-bearing unless specified by Congress. Likewise, funds being held in Clearing Accounts are not interest-bearing unless specified by Congress. Therefore, no interest will accrue in these accounts. However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer.

19 C.F.R. § 159.64(e). The narrow question presented by this litigation is whether the phrase “including interest earned on such duties” as used in the Deposits into Accounts provision, 19 U.S.C. § 1675c(e)(2), is permissibly interpreted to allow Customs to deposit into the Special Accounts only “interest charged on antidumping and countervailing duties *at liquidation*,” 19 C.F.R. § 159.64(e) (emphasis added).⁶

E. Judicial Review of Statutory Interpretations by Agencies to Which Congress Delegated Rulemaking Authority

When a government agency promulgates a rule interpreting a provision within a statutory scheme the agency is entrusted by Congress to administer, the court proceeds according to the Supreme Court’s analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–46 (1984) (“*Chevron*”). As *Chevron* instructed, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43 (footnote omitted). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9. For a *Chevron* “step one” analysis, “traditional tools of statutory construction,” *id.*, include the examination of the statutory text and structure and the legislative history. *See, e.g., Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1303, 1312–14 (Fed. Cir. 2017) (en banc); *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017), *cert. denied*, 138 S.Ct. 690 (2018) (“We may find Congress has expressed unambiguous intent by examining the statute’s text, structure, and legislative history, and apply the relevant canons of interpretation.”) (internal quotations and citations omitted); *Kyocera Solar, Inc. v. U.S. Int’l Trade Comm’n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016). If the intent of Congress is not clear, the court,

⁶ The decision by the U.S. Customs Service that the Special Accounts and Clearing Accounts would not bear interest, which Customs combined in 19 C.F.R. § 159.64(e) with its decision on the interest it would deposit on assessed duties, is not contested in this litigation.

under “step two” of a *Chevron* analysis, must accept the agency’s interpretation of the statute if it is reasonable and “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron*, 467 U.S. at 844 (footnote omitted).

F. CDSOA Provisions Addressing Interest “Earned on” Assessed AD and CVD Duties and “Funds” from Such Assessed Duties

The court begins with the text of the provision directly at issue. *See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”). In the Deposits into Accounts provision, Congress directed Customs to deposit into the Special Accounts “all antidumping or countervailing duties (including *interest earned on* such duties) that are assessed” under an AD or CVD order. 19 U.S.C. § 1675c(e)(2) (emphasis added). In speaking broadly of interest “earned on” these duties, the provision addresses *whether* interest is earned on the duties and does not distinguish as to *when* interest is earned. In that respect, the plain meaning of the phrase “interest earned on such duties,” at first blush, does not favor the agency’s interpretation.⁷ Nevertheless, the provision is not free of ambiguity. Understanding the meaning of the words “interest earned on such duties” requires consideration of other provisions of the Tariff Act, which govern how antidumping and countervailing duties earn interest for the government. Congress must be presumed to have been aware, also, that upon liquidation, Customs combines underpaid duties, taxes, fees, and accrued interest to calculate a single amount that is owed by the importer of record on the entry as a whole. *See* 19 U.S.C. § 1505(b), (c). Thus, once all duties, taxes, fees, and interest owed upon an entry for consumption are “liquidated,” i.e., reduced to a single sum to which certain aspects of finality have attached, the individual amounts of the various duties, taxes, fees, and interest might be seen as having

⁷ Defendants argue that the words “are assessed” as used in 19 U.S.C. § 1675c(e)(2) limit the scope of the provision to interest that is “assessed” at liquidation, not interest that accrues thereafter. Defs.’ Resp. to Pls.’ Mot. for J. on the Agency R. and for Recons. 16–19 (Aug. 9, 2021), ECF No. 88. The court disagrees. The wording does not support defendants’ interpretation: “The Commissioner shall deposit into the special accounts, all antidumping or countervailing *duties* (including interest earned on such duties) that *are assessed* . . .” 19 U.S.C. § 1675c(e)(2) (emphasis added). The subject of the sentence containing the predicate “are assessed” is the plural term “duties,” not the singular term “interest.” An interpretation that accords with plain meaning should not dispense with agreement between subject and verb.

lost their individual character as a result of the liquidation process. Under that reasoning, Congress could have considered the interest accruing on an entry after liquidation to be accruing on the entry as a whole and not on those individual amounts.

One other provision of the CDSOA, the “Distribution of Funds” provision, also mentions interest “earned.” This provision does not resolve the ambiguity surrounding the issue of whether interest accruing on delinquent amounts after the liquidation process is completed is interest that is “earned” within the intended meaning of the CDSOA. The first sentence of the Distribution of Funds provision reads as follows:

DISTRIBUTION OF FUNDS.—The Commissioner shall distribute all funds (including *all interest earned on the funds*) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2).

Id. § 1675c(d)(3) (emphasis added). While it is plausible to interpret the phrase “all interest earned on the *funds*” to refer only to interest earned on the Special Accounts (of which interest, Customs concluded, there could be none), as opposed to interest earned on underpaid duties, this is not the only possible interpretation. *Id.* (emphasis added). In the same provision, Congress referred to “funds . . . *from assessed duties* received in the preceding fiscal year.” *Id.* (emphasis added). Also, Congress used the term “funds *in a special account*” in referring to what is to be distributed to ADPs, *id.* § 1675c(e)(3) (emphasis added), suggesting that the word “funds” refers to what is in a Special Account as opposed to the Special Account itself. When read in conjunction with the Deposits into Accounts provision, the Distribution of Funds provision is reasonably interpreted to address the distribution of the duties, and the interest earned thereon, that are deposited into the Special Accounts according to the Deposits into Accounts provision.

In summary, the Deposits into Accounts and Distribution of Funds provisions indicate congressional intent that Customs would: (1) deposit into the Special Accounts assessed antidumping and countervailing duties, *id.* § 1675c(e); (2) deposit also into the Special Accounts “interest,” *id.* § 1675c(e)(2), i.e., “all interest,” *id.* § 1675c(d)(3), earned on such “funds” or “duties”; and (3) distribute to ADPs all funds from assessed duties, together with all interest earned thereon, received in the preceding fiscal year, *id.* Although the CDSOA sets forth in some detail the procedures for distribution of “continued dumping and subsidy offsets,” neither the Deposits into Accounts provision nor the

Distribution of Funds provision defines precisely what is meant by the use of the term “interest earned on such duties” or the term “all interest earned on the funds,” respectively. Therefore, the court looks beyond the CDSOA to other Tariff Act provisions that affect how antidumping and countervailing duties earn interest for the government for an indication of what Congress may have meant in using the term “interest earned.”

G. Tariff Act Provisions on the Government’s Earning of Interest on Countervailing and Antidumping Duties

The Trade Agreements Act of 1979 (the “TAA”) amended the Tariff Act to provide that underpayments on deposited antidumping and countervailing duties would earn interest for the government and that overpayments would earn interest for the importer. Pub. L. No. 96–39, 93 Stat. 144, 188–89. In its current form and in the form in which it relates to this litigation, Section 778(a) of the Tariff Act provides that “[i]nterest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order under this subtitle”⁸ 19 U.S.C. § 1677g(a). The current requirement to deposit estimated countervailing and antidumping duties during the entry process appeared in related provisions of the TAA.⁹

At the time of the 1979 amendment, the Tariff Act, while requiring (in Section 505(a) thereof) the deposit of estimated duties “at the time of making entry,” did not provide for the assessment of interest, at the time of liquidation, on overpayments or underpayments of estimated ordinary (“normal”) customs duties. 19 U.S.C. § 1505 (1976). Nor did the Tariff Act, at that time, provide for interest on late payment of

⁸ As originally enacted, the Trade Agreements Act of 1979 (the “TAA”) made the interest provision applicable on and after the date of notice of an affirmative injury/threat determination by the U.S. International Trade Commission. Pub. L. No. 96–39, 93 Stat. 144, 188–89. Congress amended the provision in the Trade and Tariff Act of 1984 to provide that the interest would be payable on and after the date of publication of a countervailing duty or antidumping duty order. Pub. L. No. 98–573, 98 Stat. 2948, 3039.

⁹ The related provisions in the TAA provided for cash deposits of estimated antidumping and countervailing duties, in procedures parallel to those of Section 505 of the Tariff Act, 19 U.S.C. § 1505, as in effect at the time for ordinary (“normal”) customs duties. The Tariff Act of 1930 provides for the deposit of estimated countervailing duties (in an amount determined by the International Trade Administration, Department of Commerce, not Customs) in section 706(a)(3), which requires, following publication of a countervailing duty order, “the deposit of estimated countervailing duties pending liquidation of entries of merchandise *at the same time as estimated normal customs duties on that merchandise are deposited.*” 19 U.S.C. § 1671e(a)(3) (emphasis added). A nearly identical provision, Section 736(a)(3) of the Tariff Act, requires, following publication of an antidumping duty order, “the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.” *Id.* § 1673e(a)(3).

additional duties that Customs billed to the importer after the completion of the liquidation process. Under the 1979 amendment, therefore, the interest described in Section 778(a), 19 U.S.C. § 1677g(a), began accruing when the estimated antidumping or countervailing duties were required to be deposited, and it stopped accruing upon liquidation of the entry. Customs implemented the CDSOA so as to deposit this “liquidated” interest and include it in the annual distributions to the ADPs.

The authority for the “delinquency” interest plaintiffs seek in this litigation was added to the Tariff Act five years after the TAA. In the Trade and Tariff Act of 1984, Congress amended Section 505 of the Tariff Act to add a new subsection (then subsection (c)), which provided for “delinquency interest” on late payments of amounts Customs determined in the liquidation process to be owing. The new subsection read as follows:

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

Pub. L. No. 98–573, 98 Stat. 2948, 2977 (1984). By regulation, the Treasury Secretary provided that underpayments would be charged interest at the interest rate set semiannually according to 26 U.S.C. § 6621 and compounded daily in accordance with 26 U.S.C. § 6622. *Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Custom Servs. May 29, 1985).

In the North American Free Trade Agreement Implementation Act (“NAFTA Implementation Act”), Congress amended Section 505 of the Tariff Act to provide for the accrual to the government of interest on underpayments of ordinary (“normal”) customs duties (as well as the accrual of interest to the importer of record of interest on any excess monies deposited). Pub. L. No. 103–182, 107 Stat. 2057, 2205 (1993). Subsection (a) of that section requires the importer of record to deposit with Customs “at the time of entry or such later time as the Secretary may prescribe by regulation (but not later than 12 working days after entry or release) the amount of duties and fees estimated to be payable on such merchandise.” 19 U.S.C. § 1505(a). Subsection (b) of the amended Section 505 directs Customs to collect “any increased or additional duties and fees due, together with interest

thereon . . . as determined on a liquidation or reliquidation.” *Id.* § 1505(b). “Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment.” *Id.* In subsection (c) of Section 505 as amended by the NAFTA Implementation Act, Congress specified the timing of the accrual of the interest the government earns from any underpayment of the deposit of estimated duties and fees required under subsection (a) of that section. According to the provision, “[i]nterest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.” *Id.* § 1505(c).

In the new Section 505(d), Congress retained the delinquency provision in more detailed form, providing that “[i]f duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [which begins with the issuance of the bill by Customs], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid.” *Id.* § 1505(d). The provision adds that “[n]o interest shall accrue during the 30-day period in which payment is actually made.”¹⁰ *Id.*

H. The Agency’s Interpretation of the Interest Provisions in the CDSOA Is Reasonable

The history of the interest provisions in Section 778(a) of the Tariff Act, 19 U.S.C. § 1677g, and Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d), and the effect of the liquidation process cause the court to conclude that the agency’s interpretation was reasonable.

As the court explained above, the statutory history indicates that Section 778(a) interest accrues from the date of required deposit to the date of liquidation, and not beyond that date, and that when Congress provided for Section 778(a) interest in 1979, the Tariff Act did not provide for delinquency interest, which Congress created five years later. Section 778(a) interest, unlike Section 505(d) interest, is unique to antidumping and countervailing duties. Interest on antidumping and countervailing duties accruing from the time of the required deposit to the liquidation of the entry and assessed at liquidation unambiguously can be described as interest earned *on* those duties. But the same cannot be said for interest that begins to accrue

¹⁰ It appears that the amended delinquency provision conformed the statute to the implementing regulations for the then-existing provision. See *Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Customs Serv. May 29, 1985).

on the total amount owing on an already-liquidated entry. The concept of “liquidation” under the Tariff Act reinforces this conclusion.

Liquidation is the procedural step during which the amount the importer of record owes on the entry is “fixed,” i.e., becomes final for most purposes under the Tariff Act. *See* 19 U.S.C. §§ 1500, 1514. Although the Tariff Act provides for certain exceptions to this finality, *see, e.g., id.* §§ 1501 (reliquidation), 1592 (entry by means of fraud, gross negligence, or negligence), the basic principle is that the individual amounts of duties and fees (including the amount of antidumping or countervailing duties, together with any interest required to be assessed by 19 U.S.C. § 1677g) are “fixed,” i.e., ascertained, combined into a single sum, and billed to the importer of record.¹¹ While the specific amount of interest “earned on” underpaid antidumping and countervailing duties under Section 778(a) is “fixed” at the time of liquidation, no interest, and no portion of the interest, accruing under Section 505(d) can be described in this way. In light of this intricate statutory structure, the interest assessed under Section 505(d) reasonably may be viewed as interest owing on a combined, “liquidated” amount for the entry rather than interest “earned on” antidumping or countervailing duties *per se*. Therefore, it was reasonable for Customs to interpret the CDSOA as requiring the deposit and distribution of only that interest on antidumping and countervailing duties that was assessed at liquidation of the entry.

Plaintiffs argue that the words “all interest” as used in the Distribution of Funds provision are unambiguous and must be interpreted to include delinquency interest. Pls.’ Br. 21–23. (“Because the statute covers ‘all interest,’ and because delinquency interest is obviously a type of interest, the statute unambiguously requires CBP to deposit delinquency interest in the special accounts and then distribute it to ADPs.”).

The court disagrees that the statute is unambiguous on the question of whether interest under Section 505(d) must be deposited and distributed. Contrary to the arguments the plaintiffs advance, the ambiguity stems not from the words “interest” or “all interest” but from the phrase “interest *earned on*,” which appears in both the Deposits into Accounts and Distribution of Funds provisions. The interest Congress had in mind must have been “earned on” assessed antidumping or countervailing duties, 19 U.S.C. § 1675c(e)(2), or

¹¹ Antidumping and countervailing duties, like ordinary duties, for most purposes are fixed at the time of liquidation of the entry. For example, the Tariff Act provides that judicial challenges brought under 19 U.S.C. § 1516a to the individual amount of antidumping or countervailing duties owing, as determined by the International Trade Administration, U.S. Department of Commerce, may no longer be brought after the entry is liquidated. *See* 19 U.S.C. § 1516a(e).

earned on the “funds . . . from assessed duties,” *id.* § 1675c(d)(3). For the reasons the court has discussed, interest earned on a delinquent payment of an already-liquidated entry can be viewed as having been earned on the single, liquidated sum that is in arrears. As a result of the liquidation, this sum is a procedural step removed from the interest accruing under the only statutory provision, 19 U.S.C. § 1677g, that Congress directed specifically to interest earned on anti-dumping and countervailing duties.

Plaintiffs also argue that CBP’s reading of the CDSOA is not entitled to deference in that it “hinges on giving the preamble *dispositive weight* . . . , but regulatory preambles are not entitled to deference.” Pls.’ Br. 34. The court is unpersuaded by this argument as well. Section 159.64(e) of the regulation states, in relevant part: “statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer.” 19 C.F.R. § 159.64(e). As this court previously noted, this regulation connotes that any other type of interest (i.e., delinquency interest) will not be placed into the special accounts, and the preamble to the regulation clarifies that only interest assessed at liquidation will be deposited. *American Drew I*, 450 F. Supp. 3d at 1385. The fact that the preamble provides clarity to CBP’s regulation is not a ground upon which the court may refuse to accept CBP’s reasonable interpretation of the CDSOA.

III. CONCLUSION

Due to the ambiguity inherent in the words “earned on,” the court concludes that it must analyze the CDSOA according to step two of the analysis required by *Chevron*. Even were the court to conclude that plaintiffs’ interpretation of the statutory provisions is the more reasonable one (and it does not so conclude), still it would be required to accept the agency’s interpretation if that interpretation also is reasonable. *See Chevron*, 467 U.S. at 843. Customs is the agency Congress “entrusted” to administer not only the CDSOA but also the other provisions of the Tariff Act, i.e., the “statutory scheme,” defining how interest is earned on antidumping and countervailing duties. *Id.* (footnote omitted).

The court concludes that Customs reasonably interpreted the CDSOA as requiring deposit into the Special Accounts only the interest on countervailing and antidumping duties accruing from the time of required deposit to liquidation of the entries. The Tariff Act establishes a direct connection between interest accruing under Section 778(a), 19 U.S.C. § 1677g, and the specific type of duties upon which it accrues and according to which it is determined upon liquidation.

Under statutory language susceptible to more than one interpretation, it was reasonable for Customs to conclude that Congress specifically contemplated only this type of “interest” on “assessed” duties when enacting the CDSOA.

As the court also has discussed, the history and structure of the relevant Tariff Act provisions reveals that Section 778(a) interest, which is the only type of interest specific to antidumping and countervailing duties, stops accruing at liquidation. In contrast, Section 505(d) interest, which is not determined at liquidation, accrues on the amount Customs bills to an importer of record that is not paid (by the importer of record or its surety) within the 30-day period provided for in Section 505(c) of the Tariff Act. The components in the total sum consisting of underpaid antidumping or countervailing duties and the Section 778(a) interest thereon were assessed and billed to the importer, together with all other amounts owing, as a result of liquidation. Under the statutory scheme, considered on the whole, it was reasonable for Customs to view those components as having lost their individual character as a result of the liquidation process. Consistent with the interpretation Customs adopted, interest “earned on” on the antidumping and countervailing duties can be viewed as interest determined at liquidation to have accrued, i.e., “earned,” by the government on those specific duties, in an amount that stopped accruing at liquidation and was fixed *upon* liquidation.

Pursuant to USCIT Rule 56.1, the court will deny the motions for judgment on the agency record and enter judgment for defendants.

Dated: June 16, 2022

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–72

HILEX POLY CO., LLC, et al., Plaintiffs, v. UNITED STATES, et al.,
Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 17–00090

[Denying motion of plaintiffs for judgment on the agency record]

Dated: June 16, 2022

J. Michael Taylor, King & Spalding LLP, of Washington, D.C., for plaintiffs Hilex Poly Co., LLC, Superbag LLC (successor to Superbag Corporation), Unistar Plastics, LLC, Command Packaging, LLC (successor to Grand Packaging Inc. d/b/a Command Packaging), Roplast Industries Inc., and US Magnesium LLC (successor to Magnesium

Corporation of America). With him on the submissions were *Jeffrey M. Telep*, *Jeremy M. Bylund*, and *Neal J. Reynolds*.

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the submission were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION

Stanceu, Judge:

Plaintiffs Hilex Poly Co., LLC, Superbag LLC, Unistar Plastics, LLC, Command Packaging, LLC, Roplast Industries Inc., and US Magnesium LLC are U.S. companies that qualified as “affected domestic producers” (“ADPs”) entitled to receive certain cash distributions under the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs received annual distributions resulting from the government’s collection of duties assessed and collected upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

In this litigation, plaintiffs claim that the U.S. Customs Service, now U.S. Customs and Border Protection (“Customs” or “CBP”), unlawfully failed to include in their distributions interest assessed after liquidation (“delinquency interest”) that pertained to collected antidumping or countervailing duties.

Before the court is plaintiffs’ motion for judgment on the agency record under USCIT Rule 56.1, in which they argue that CBP’s refusal to include the delinquency interest in their distributions was contrary to the Byrd Amendment and seek judgments for payment of the interest they claim they should have received. Because plaintiffs have not demonstrated their entitlement to these judgments, the court denies their motion.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion and Order granting defendants’ motion to dismiss in part and denying it in part. *See Hilex Poly Co., LLC v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1390, 1392–1395 (2020) (“*Hilex Poly I*”).

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

Plaintiffs commenced this action on April 20, 2017. Summons, ECF No. 1; Compl., ECF No. 2.

Defendants filed their motion to dismiss on September 12, 2018. Defs.' Mot. to Dismiss, ECF No. 19. On June 1, 2020, this court issued its Opinion and Order ruling that plaintiffs' claims seeking delinquency interest on any CDSOA distributions received prior to April 18, 2015, were untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i). *Hilex Poly I*, 44 CIT at __, 450 F. Supp. at 1401–02.²

On May 24, 2021, all plaintiffs joined in a motion for judgment on the agency record and accompanying brief. Pls.' Mot. for J. on the Agency R. and for Recons., ECF No. 83 ("Pls.' Br."). On August 9, 2021, the government responded in opposition to plaintiffs' motion. Defs.' Resp. to Pls.' Mot. for J. on the Agency R. and for Recons., ECF No. 90. Plaintiffs replied on October 8, 2021. Reply in Supp. of Pls.' Rule 56.1 Mot. for J. on the Administrative R. and for Recons., ECF No. 94.

On October 15, 2021, Plaintiffs filed a consent motion for oral argument. Pls.' Consent Mot. for Oral Arg., ECF No. 95.

II. DISCUSSION

A. Subject Matter Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i). Subparagraph (1)(B) of § 1581(i) grants this court jurisdiction of any civil action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and subparagraph (1)(D) of § 1581(i) provides this court jurisdiction of any civil action "that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph"

As directed by 28 U.S.C. § 2640(e), the court "shall review the matter as provided in section 706 of title 5." The latter provision, of the Administrative Procedure Act, directs the court, *inter alia*, to "hold unlawful and set aside agency action, findings, and conclusions found to be— . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

² Plaintiffs' motion to reconsider the court's ruling in *Hilex Poly Co., LLC v. United States*, 44 CIT __, 450 F. Supp. 3d 1390 (2020) was denied in a prior Opinion and Order issued by the court. *Hilex Poly Co., LLC v. United States*, 46 CIT __, Slip Op. No. 22–62 (June 8, 2022).

B. “Continued Dumping and Subsidy Offsets” under the Byrd Amendment

The CDSOA, 19 U.S.C. § 1675c, enacted in October 2000 and repealed in February 2006,³ amended the Tariff Act of 1930 (“Tariff Act”) to direct Customs to distribute funds from assessed antidumping and countervailing duties to ADPs on a federal fiscal year basis, as compensation for certain qualifying expenditures. 19 U.S.C. § 1675c(a). The CDSOA defined an “affected domestic producer” generally as a “manufacturer, producer, farmer, rancher, or worker representative” that was a “petitioner or interested party in support of the petition with respect to which an antidumping duty . . . or a countervailing duty order has been entered” and that “remains in operation.” *Id.* § 1675c(b)(1). The annual distribution an ADP received was identified in the CDSOA “as the ‘continued dumping and subsidy offset.’” *Id.* § 1675c(a).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of an antidumping duty or countervailing duty petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2).

The CDSOA prescribed a detailed procedure by which Customs was to retain antidumping and countervailing duties and distribute them annually to ADPs. Customs was directed to establish a “special account” in the U.S. Treasury for each then-existing and future AD or CVD order, into which it was to deposit all antidumping and countervailing duties “assessed” under such order, after the effective date of the CDSOA. *Id.* § 1675c(e). Customs was directed to distribute to ADPs, each federal fiscal year on a pro-rata basis, the “funds” from the assessed duties for the respective AD or CVD order that were “received in the preceding fiscal year,” based on each ADP’s certification of “new and remaining qualifying expenditures.” *Id.* § 1675c(d)(3). Distributions were required to occur within 60 days following the first day of the fiscal year. *See id.* § 1675c(c).

³ Under the terms of the 2006 legislation repealing the CDSOA, Customs is to distribute antidumping and countervailing duties assessed on entries made before October 1, 2007, subject to certain limitations imposed in 2010. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4, 154 (2006), amended by Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064, 3163, amended by Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, 124 Stat. 3296, 3308 (current version at 19 U.S.C. § 1675c note).

C. Implementation of the CDSOA by Customs

Following notice and comment on a proposed rule, Customs promulgated a final rule to prescribe “administrative procedures, including the time and manner, under which antidumping and countervailing duties assessed on imported products would be distributed to affected domestic producers as an offset for certain qualifying expenditures.” *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546, 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)); see 19 U.S.C. § 1675c(c) (“the Commissioner [of Customs] shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section.”), (e)(3) (“Consistent with the requirements of subsections (c) and (d), the Commissioner [of Customs] shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.”).

In promulgating its regulations, Customs made several interpretations of the CDSOA. One example concerned the interpretation of the word “assessed” as it is used throughout the CDSOA to modify the word “duties.” The CDSOA refers to “duties assessed” pursuant to a countervailing or antidumping duty order, *id.* § 1675c(a), and imposes the parallel requirements to deposit into the special accounts all “duties . . . that are assessed” under such an order, *id.* § 1675c(e)(2), and to distribute annually to ADPs “all funds . . . from assessed duties,” *id.* § 1675c(d)(3). Customs interpreted these references to mean antidumping and countervailing duties that are “assessed” at liquidation and collected by Customs, both as estimated duties deposited with Customs upon or soon after entry, and as payments of any additional amounts owing following liquidation of that entry. See 19 C.F.R. § 159.64. The interpretation of the word “assessed” to refer to duties assessed at liquidation, and collected by Customs both before and after liquidation, is not challenged in this litigation.⁴

Also unchallenged in this litigation is a decision by Customs to establish “Clearing Accounts,” a procedural measure not mentioned in the CDSOA, which directs the creation of only the Special Accounts. Customs designated the Clearing Accounts for the deposit of estimated antidumping and countervailing duties, *id.* § 159.64(a)(2), reserving the Special Accounts for the transfer from the Clearing Accounts of antidumping duties and countervailing duties “when an

⁴ The court does not suggest or imply that the agency’s interpretation of “assessed” to mean “assessed and collected” is unreasonable. The contrary interpretation would result in deposits from the U.S. Treasury into the Special Accounts of amounts not collected, or not yet collected, from importers. Moreover, the statute, in a provision on the termination of a Special Account, refers to the time that “all entries relating to the order or finding are liquidated and duties assessed *collected*.” 19 U.S.C. § 1675c(e)(4)(B) (emphasis added).

entry upon which antidumping or countervailing duties are owed is properly liquidated pursuant to an order, finding or receipt of liquidation instructions,” *id.* § 159.64(b)(1)(ii).

The dispute in this case arose instead from the interpretation that Customs, upon promulgating its implementing regulations, gave to a provision of the CDSOA—the “Deposits into Accounts” provision—with respect to the treatment of interest earned by the government on antidumping and countervailing duties. As discussed in further detail below, Customs interpreted this provision as requiring it to deposit into the Special Accounts the interest the government earned on underpaid deposits of estimated antidumping and countervailing duties that was assessed at liquidation and later collected. Customs did not place into the Special Accounts any interest the government earned that was assessed and collected after liquidation of the entries. The issue presented in this litigation is whether that interpretation was a permissible one. As discussed below, the court concludes that it was.

D. The Interpretation of the “Deposits into Accounts” Provision of the CDSOA Adopted by Section 159.64(e) of the Customs Regulations

The Byrd Amendment provision directly at issue in this litigation reads as follows:

DEPOSITS INTO ACCOUNTS.—The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including *interest earned* on such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

19 U.S.C. § 1675c(e)(2) (emphasis added). In promulgating and administering its implementing regulations, Customs interpreted the term “including interest earned on such duties” to mean that it would deposit into the Special Accounts the interest on underpayments of antidumping and countervailing duties that the government earns up until the time of liquidation of the entry, and determines as a fixed amount upon liquidation, but not any “delinquency” interest it earns on the entry thereafter.⁵ The implementing regulations expressed this decision as follows:

⁵ Prior to 2016, Customs deposited interest assessed at liquidation on underpaid deposits of antidumping and countervailing duties, but not interest accruing after liquidation, into the special accounts for distributions made to affected domestic producers under the CDSOA. Defs.’ Mot. to Dismiss 3–5 (Sept. 12, 2018), ECF No. 19. In 2016, Congress required specified types of interest paid on a bond or by a surety, including interest accruing after liquidation,

Interest on Special Accounts and Clearing Accounts. In accordance with Federal appropriations law, and Treasury guidelines on Special Accounts, funds in such accounts are not interest-bearing unless specified by Congress. Likewise, funds being held in Clearing Accounts are not interest-bearing unless specified by Congress. Therefore, no interest will accrue in these accounts. However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer.

19 C.F.R. § 159.64(e). The narrow question presented by this litigation is whether the phrase “including interest earned on such duties” as used in the Deposits into Accounts provision, 19 U.S.C. § 1675c(e)(2), is permissibly interpreted to allow Customs to deposit into the Special Accounts only “interest charged on antidumping and countervailing duties *at liquidation*,” 19 C.F.R. § 159.64(e) (emphasis added).⁶

E. Judicial Review of Statutory Interpretations by Agencies to Which Congress Delegated Rulemaking Authority

When a government agency promulgates a rule interpreting a provision within a statutory scheme the agency is entrusted by Congress to administer, the court proceeds according to the Supreme Court’s analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–46 (1984) (“*Chevron*”). As *Chevron* instructed, “[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43 (footnote omitted). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9. For a *Chevron* “step one” analysis, “traditional tools of statutory construction,” *id.*, include the examination of the statutory text and structure and the legislative history. *See, e.g., Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1303, 1312–14 (Fed. Cir. 2017) (en banc); *Gazelle v. Shulkin*, 868 F.3d 1006, to be included in CDSOA distributions. Congress did not address the question of interest other than interest paid on a bond or by a surety, nor did it make the provision retroactive. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 122, 187–88 (2016) (“TFTEA”). All CDSOA distributions at issue in this Opinion and Order occurred prior to the 2016 enactment of TFTEA.

⁶ The decision by the U.S. Customs Service that the Special Accounts and Clearing Accounts would not bear interest, which Customs combined in 19 C.F.R. § 159.64(e) with its decision on the interest it would deposit on assessed duties, is not contested in this litigation.

1010 (Fed. Cir. 2017), *cert. denied*, 138 S.Ct. 690 (2018) (“We may find Congress has expressed unambiguous intent by examining the statute’s text, structure, and legislative history, and apply the relevant canons of interpretation.”) (internal quotations and citations omitted); *Kyocera Solar, Inc. v. U.S. Int’l Trade Comm’n*, 844 F.3d 1334, 1338 (Fed. Cir. 2016). If the intent of Congress is not clear, the court, under “step two” of a *Chevron* analysis, must accept the agency’s interpretation of the statute if it is reasonable and “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron*, 467 U.S. at 844 (footnote omitted).

F. CDSOA Provisions Addressing Interest “Earned on” Assessed AD and CVD Duties and “Funds” from Such Assessed Duties

The court begins with the text of the provision directly at issue. *See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”). In the Deposits into Accounts provision, Congress directed Customs to deposit into the Special Accounts “all antidumping or countervailing duties (including *interest earned on* such duties) that are assessed” under an AD or CVD order. 19 U.S.C. § 1675c(e)(2) (emphasis added). In speaking broadly of interest “earned on” these duties, the provision addresses *whether* interest is earned on the duties and does not distinguish as to *when* interest is earned. In that respect, the plain meaning of the phrase “interest earned on such duties,” at first blush, does not favor the agency’s interpretation.⁷ Nevertheless, the provision is not free of ambiguity. Understanding the meaning of the words “interest earned on such duties” requires consideration of other provisions of the Tariff Act, which govern how antidumping and countervailing duties earn interest for the government. Congress must be presumed to have been aware, also, that

⁷ Defendants argue that the words “are assessed” as used in 19 U.S.C. § 1675c(e)(2) limit the scope of the provision to interest that is “assessed” at liquidation, not interest that accrues thereafter. Defs.’ Resp. to Pls.’ Mot. for J. on the Agency R. and for Recons. 16–19 (Aug 9, 2021), ECF No. 90. The court disagrees. The wording does not support defendants’ interpretation: “The Commissioner shall deposit into the special accounts, all antidumping or countervailing *duties* (including interest earned on such duties) that *are assessed* . . .” 19 U.S.C. § 1675c(e)(2) (emphasis added). The subject of the sentence containing the predicate “are assessed” is the plural term “duties,” not the singular term “interest.” An interpretation that accords with plain meaning should not dispense with agreement between subject and verb.

upon liquidation, Customs combines underpaid duties, taxes, fees, and accrued interest to calculate a single amount that is owed by the importer of record on the entry as a whole. *See* 19 U.S.C. § 1505(b), (c). Thus, once all duties, taxes, fees, and interest owed upon an entry for consumption are “liquidated,” i.e., reduced to a single sum to which certain aspects of finality have attached, the individual amounts of the various duties, taxes, fees, and interest might be seen as having lost their individual character as a result of the liquidation process. Under that reasoning, Congress could have considered the interest accruing on an entry after liquidation to be accruing on the entry as a whole and not on those individual amounts.

One other provision of the CDSOA, the “Distribution of Funds” provision, also mentions interest “earned.” This provision does not resolve the ambiguity surrounding the issue of whether interest accruing on delinquent amounts after the liquidation process is completed is interest that is “earned” within the intended meaning of the CDSOA. The first sentence of the Distribution of Funds provision reads as follows:

DISTRIBUTION OF FUNDS.—The Commissioner shall distribute all funds (including *all interest earned* on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2).

Id. § 1675c(d)(3) (emphasis added). While it is plausible to interpret the phrase “all interest earned on the *funds*” to refer only to interest earned on the Special Accounts (of which interest, Customs concluded, there could be none), as opposed to interest earned on underpaid duties, this is not the only possible interpretation. *Id.* (emphasis added). In the same provision, Congress referred to “funds . . . *from assessed duties* received in the preceding fiscal year.” *Id.* (emphasis added). Also, Congress used the term “funds *in* a special account” in referring to what is to be distributed to ADPs, *id.* § 1675c(e)(3) (emphasis added), suggesting that the word “funds” refers to what is in a Special Account as opposed to the Special Account itself. When read in conjunction with the Deposits into Accounts provision, the Distribution of Funds provision is reasonably interpreted to address the distribution of the duties, and the interest earned thereon, that are deposited into the Special Accounts according to the Deposits into Accounts provision.

In summary, the Deposits into Accounts and Distribution of Funds provisions indicate congressional intent that Customs would: (1) deposit into the Special Accounts assessed antidumping and counter-

vailing duties, *id.* § 1675c(e); (2) deposit also into the Special Accounts “interest,” *id.* § 1675c(e)(2), i.e., “all interest,” *id.* § 1675c(d)(3), earned on such “funds” or “duties”; and (3) distribute to ADPs all funds from assessed duties, together with all interest earned thereon, received in the preceding fiscal year, *id.* Although the CDSOA sets forth in some detail the procedures for distribution of “continued dumping and subsidy offsets,” neither the Deposits into Accounts provision nor the Distribution of Funds provision defines precisely what is meant by the use of the term “interest earned on such duties” or the term “all interest earned on the funds,” respectively. Therefore, the court looks beyond the CDSOA to other Tariff Act provisions that affect how antidumping and countervailing duties earn interest for the government for an indication of what Congress may have meant in using the term “interest earned.”

G. Tariff Act Provisions on the Government’s Earning of Interest on Countervailing and Antidumping Duties

The Trade Agreements Act of 1979 (the “TAA”) amended the Tariff Act to provide that underpayments on deposited antidumping and countervailing duties would earn interest for the government and that overpayments would earn interest for the importer. Pub. L. No. 96–39, 93 Stat. 144, 188–89. In its current form and in the form in which it relates to this litigation, Section 778(a) of the Tariff Act provides that “[i]nterest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order under this subtitle”⁸ 19 U.S.C. § 1677g(a). The current requirement to deposit estimated countervailing and antidumping duties during the entry process appeared in related provisions of the TAA.⁹

⁸ As originally enacted, the Trade Agreements Act of 1979 (the “TAA”) made the interest provision applicable on and after the date of notice of an affirmative injury/threat determination by the U.S. International Trade Commission. Pub. L. No. 96–39, 93 Stat. 144, 188–89. Congress amended the provision in the Trade and Tariff Act of 1984 to provide that the interest would be payable on and after the date of publication of a countervailing duty or antidumping duty order. Pub. L. No. 98–573, 98 Stat. 2948, 3039.

⁹ The related provisions in the TAA provided for cash deposits of estimated antidumping and countervailing duties, in procedures parallel to those of Section 505 of the Tariff Act, 19 U.S.C. § 1505, as in effect at the time for ordinary (“normal”) customs duties. The Tariff Act of 1930 provides for the deposit of estimated countervailing duties (in an amount determined by the International Trade Administration, Department of Commerce, not Customs) in Section 706(a)(3), which requires, following publication of a countervailing duty order, “the deposit of estimated countervailing duties pending liquidation of entries of merchandise *at the same time as estimated normal customs duties on that merchandise are deposited.*” 19 U.S.C. § 1671e(a)(3) (emphasis added). A nearly identical provision, Section 736(a)(3) of the Tariff Act, requires, following publication of an antidumping duty order, “the deposit of estimated antidumping duties pending liquidation of entries of merchandise at

At the time of the 1979 amendment, the Tariff Act, while requiring (in Section 505(a) thereof) the deposit of estimated duties “at the time of making entry,” did not provide for the assessment of interest, at the time of liquidation, on overpayments or underpayments of estimated ordinary (“normal”) customs duties. 19 U.S.C. § 1505 (1976). Nor did the Tariff Act, at that time, provide for interest on late payment of additional duties that Customs billed to the importer after the completion of the liquidation process. Under the 1979 amendment, therefore, the interest described in Section 778(a), 19 U.S.C. § 1677g(a), began accruing when the estimated antidumping or countervailing duties were required to be deposited, and it stopped accruing upon liquidation of the entry. Customs implemented the CDSOA so as to deposit this “liquidated” interest and include it in the annual distributions to the ADPs.

The authority for the “delinquency” interest plaintiffs seek in this litigation was added to the Tariff Act five years after the TAA. In the Trade and Tariff Act of 1984, Congress amended Section 505 of the Tariff Act to add a new subsection (then subsection (c)), which provided for “delinquency interest” on late payments of amounts Customs determined in the liquidation process to be owing. The new subsection read as follows:

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

Pub. L. No. 98–573, 98 Stat. 2948, 2977 (1984). By regulation, the Treasury Secretary provided that underpayments would be charged interest at the interest rate set semiannually according to 26 U.S.C. § 6621 and compounded daily in accordance with 26 U.S.C. § 6622. *Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Custom Servs. May 29, 1985).

In the North American Free Trade Agreement Implementation Act (“NAFTA Implementation Act”), Congress amended Section 505 of the Tariff Act to provide for the accrual to the government of interest on underpayments of ordinary (“normal”) customs duties (as well as the accrual of interest to the importer of record of interest on any excess monies deposited). Pub. L. No. 103–182, 107 Stat. 2057, 2205 (1993).

the same time as estimated normal customs duties on that merchandise are deposited.” *Id.* § 1673e(a)(3).

Subsection (a) of that section requires the importer of record to deposit with Customs “at the time of entry or such later time as the Secretary may prescribe by regulation (but not later than 12 working days after entry or release) the amount of duties and fees estimated to be payable on such merchandise.” 19 U.S.C. § 1505(a). Subsection (b) of the amended Section 505 directs Customs to collect “any increased or additional duties and fees due, together with interest thereon . . . as determined on a liquidation or reliquidation.” *Id.* § 1505(b). “Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment.” *Id.* In subsection (c) of Section 505 as amended by the NAFTA Implementation Act, Congress specified the timing of the accrual of the interest the government earns from any underpayment of the deposit of estimated duties and fees required under subsection (a) of that section. According to the provision, “[i]nterest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.” *Id.* § 1505(c).

In the new Section 505(d), Congress retained the delinquency provision in more detailed form, providing that “[i]f duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [which begins with the issuance of the bill by Customs], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid.” *Id.* § 1505(d). The provision adds that “[n]o interest shall accrue during the 30-day period in which payment is actually made.”¹⁰ *Id.*

H. The Agency’s Interpretation of the Interest Provisions in the CDSOA Is Reasonable

The history of the interest provisions in Section 778(a) of the Tariff Act, 19 U.S.C. § 1677g, and Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d), and the effect of the liquidation process cause the court to conclude that the agency’s interpretation was reasonable.

As the court explained above, the statutory history indicates that Section 778(a) interest accrues from the date of required deposit to the date of liquidation, and not beyond that date, and that when Congress provided for Section 778(a) interest in 1979, the Tariff Act

¹⁰ It appears that the amended delinquency provision conformed the statute to the implementing regulations for the then-existing provision. See *Calculation of Interest on Overdue Accounts and Refunds*, 50 Fed. Reg. 21,832 (Customs Serv. May 29, 1985).

did not provide for delinquency interest, which Congress created five years later. Section 778(a) interest, unlike Section 505(d) interest, is unique to antidumping and countervailing duties. Interest on antidumping and countervailing duties accruing from the time of the required deposit to the liquidation of the entry and assessed at liquidation unambiguously can be described as interest earned *on* those duties. But the same cannot be said for interest that begins to accrue on the total amount owing on an already-liquidated entry. The concept of “liquidation” under the Tariff Act reinforces this conclusion.

Liquidation is the procedural step during which the amount the importer of record owes on the entry is “fixed,” i.e., becomes final for most purposes under the Tariff Act. *See* 19 U.S.C. §§ 1500, 1514. Although the Tariff Act provides for certain exceptions to this finality, *see, e.g., id.* §§ 1501 (reliquidation), 1592 (entry by means of fraud, gross negligence, or negligence), the basic principle is that the individual amounts of duties and fees (including the amount of antidumping or countervailing duties, together with any interest required to be assessed by 19 U.S.C. § 1677g) are “fixed,” i.e., ascertained, combined into a single sum, and billed to the importer of record.¹¹ While the specific amount of interest “earned on” underpaid antidumping and countervailing duties under Section 778(a) is “fixed” at the time of liquidation, no interest, and no portion of the interest, accruing under Section 505(d) can be described in this way. In light of this intricate statutory structure, the interest assessed under Section 505(d) reasonably may be viewed as interest owing on a combined, “liquidated” amount for the entry rather than interest “earned on” antidumping or countervailing duties *per se*. Therefore, it was reasonable for Customs to interpret the CDSOA as requiring the deposit and distribution of only that interest on antidumping and countervailing duties that was assessed at liquidation of the entry.

Plaintiffs argue that the words “all interest” as used in the Distribution of Funds provision are unambiguous and must be interpreted to include delinquency interest. Pls.’ Br. 21–23. (“Because the statute covers ‘all interest,’ and because delinquency interest is obviously a type of interest, the statute unambiguously requires CBP to deposit delinquency interest in the special accounts and then distribute it to ADPs.”).

¹¹ Antidumping and countervailing duties, like ordinary duties, for most purposes are fixed at the time of liquidation of the entry. For example, the Tariff Act provides that judicial challenges brought under 19 U.S.C. § 1516a to the individual amount of antidumping or countervailing duties owing, as determined by the International Trade Administration, U.S. Department of Commerce, may no longer be brought after the entry is liquidated. *See* 19 U.S.C. § 1516a(e).

The court disagrees that the statute is unambiguous on the question of whether interest under Section 505(d) must be deposited and distributed. Contrary to the arguments the plaintiffs advance, the ambiguity stems not from the words “interest” or “all interest” but from the phrase “interest *earned on*,” which appears in both the Deposits into Accounts and Distribution of Funds provisions. The interest Congress had in mind must have been “earned on” assessed antidumping or countervailing duties, 19 U.S.C. § 1675c(e)(2), or earned on the “funds . . . from assessed duties,” *id.* § 1675c(d)(3). For the reasons the court has discussed, interest earned on a delinquent payment of an already-liquidated entry can be viewed as having been earned on the single, liquidated sum that is in arrears. As a result of the liquidation, this sum is a procedural step removed from the interest accruing under the only statutory provision, 19 U.S.C. § 1677g, that Congress directed specifically to interest earned on antidumping and countervailing duties.

Plaintiffs also argue that CBP’s reading of the CDSOA is not entitled to deference in that it “hinges on giving the preamble *dispositive weight* . . . , but regulatory preambles are not entitled to deference.” Pls.’ Br. 34. The court is unpersuaded by this argument as well. Section 159.64(e) of the regulation states, in relevant part: “statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer.” 19 C.F.R. § 159.64(e). As this court previously noted, this regulation connotes that any other type of interest (i.e., delinquency interest) will not be placed into the special accounts, and the preamble to the regulation clarifies that only interest assessed at liquidation will be deposited. *Hilex Poly I*, 450 F. Supp. 3d at 1396. The fact that the preamble provides clarity to CBP’s regulation is not a ground upon which the court may refuse to accept CBP’s reasonable interpretation of the CDSOA.

III. CONCLUSION

Due to the ambiguity inherent in the words “earned on,” the court concludes that it must analyze the CDSOA according to step two of the analysis required by *Chevron*. Even were the court to conclude that plaintiffs’ interpretation of the statutory provisions is the more reasonable one (and it does not so conclude), still it would be required to accept the agency’s interpretation if that interpretation also is reasonable. *See Chevron*, 467 U.S. at 843. Customs is the agency Congress “entrusted” to administer not only the CDSOA but also the other provisions of the Tariff Act, i.e., the “statutory scheme,” defining

how interest is earned on antidumping and countervailing duties. *Id.* (footnote omitted).

The court concludes that Customs reasonably interpreted the CD-SOA as requiring deposit into the Special Accounts only the interest on countervailing and antidumping duties accruing from the time of required deposit to liquidation of the entries. The Tariff Act establishes a direct connection between interest accruing under Section 778(a), 19 U.S.C. § 1677g, and the specific type of duties upon which it accrues and according to which it is determined upon liquidation. Under statutory language susceptible to more than one interpretation, it was reasonable for Customs to conclude that Congress specifically contemplated only this type of “interest” on “assessed” duties when enacting the CDSOA.

As the court also has discussed, the history and structure of the relevant Tariff Act provisions reveals that Section 778(a) interest, which is the only type of interest specific to antidumping and countervailing duties, stops accruing at liquidation. In contrast, Section 505(d) interest, which is not determined at liquidation, accrues on the amount Customs bills to an importer of record that is not paid (by the importer of record or its surety) within the 30-day period provided for in Section 505(c) of the Tariff Act. The components in the total sum consisting of underpaid antidumping or countervailing duties and the Section 778(a) interest thereon were assessed and billed to the importer, together with all other amounts owing, as a result of liquidation. Under the statutory scheme, considered on the whole, it was reasonable for Customs to view those components as having lost their individual character as a result of the liquidation process. Consistent with the interpretation Customs adopted, interest “earned on” on the antidumping and countervailing duties can be viewed as interest determined at liquidation to have accrued, i.e., “earned,” by the government on those specific duties, in an amount that stopped accruing *at* liquidation and was fixed *upon* liquidation.

Pursuant to USCIT Rule 56.1, the court will deny the motions for judgment on the agency record and enter judgment for defendants.

Dated: June 16, 2022

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–73

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiffs, and CHENG CH INTERNATIONAL CO., LTD., CHINA STAPLE ENTERPRISE CORPORATION, DE FASTENERS INC., HOYI PLUS CO., LTD., LIANG CHYUAN INDUSTRIAL CO., LTD., TRIM INTERNATIONAL INC., UJL INDUSTRIES CO., LTD., YU CHI HARDWARE CO., LTD., and ZON MON CO., LTD., Consolidated-Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE INC., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 20–03911

[Sustaining Commerce’s use of the expected method in its calculation of the non-selected respondents’ rate in this antidumping duty review of certain steel nails from Taiwan.]

Dated: June 16, 2022

Bryan P. Cenko, Mowry & Grimson, PLLC, of Washington, DC, argued for Plaintiff. With him on the brief were *Jeffrey S. Grimson*, *Jill A. Cramer*, and *Wenhui (Flora) Ji*.

Kelly Slater, Appleton Luff Pte Ltd., of Washington, DC, argued for Consolidated Plaintiffs. With her on the brief was *Edmund Sim*.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Vania Y. Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Jennifer M. Smith*, *Ping Gong*, and *Lauren N. Fraid*.

OPINION

Barnett, Chief Judge:

This consolidated action is before the court on two motions for judgment on the agency record pursuant to U.S. Court of International Trade (“CIT”) Rule 56.2 challenging certain aspects of the final results issued by the U.S. Department of Commerce (“Commerce” or “the agency”) in its review of the antidumping duty (“ADD”) order covering certain steel nails from Taiwan. *See Certain Steel Nails From Taiwan*, 85 Fed. Reg. 76,014 (Dep’t Commerce Nov. 27, 2020) (final results of antidumping duty admin. review and final determination of no shipments; 2018–2019) (“*Final Results*”), and accompanying Issues and Decision Mem., A-583–854 (Nov. 20, 2020) (“I&D Mem.”), ECF No. 17–5;¹ *see also* Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Pl. PrimeSource Building Prods., Inc., ECF

¹ The administrative record associated with the underlying proceeding is contained in a Public Administrative Record (“PR”), ECF No. 17–2, and a Confidential Administrative

No. 25, and accompanying Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Pl. PrimeSource Building Prods., Inc., (“PrimeSource’s MJAR”), ECF No. 25–2; Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Consol. Pls., and accompanying Mem. of P. & A. in Supp. of Consol. Pls.’ Rule 56.2 Mot. for J. Upon the Agency R. (“Consol. Pls.’ MJAR”), ECF No. 24.

Specifically, Plaintiff PrimeSource Building Products, Inc. (“PrimeSource”) and Consolidated Plaintiffs Cheng Ch International Co., Ltd., China Staple Enterprise Corporation, De Fasteners Inc., Hoyi Plus Co., Ltd., Liang Chyuan Industrial Co., Ltd., Trim International Inc., UJL Industries Co., Ltd., Yu Chi Hardware Co., Ltd., and Zon Mon Co., Ltd., (together with PrimeSource, “Plaintiffs”) challenge the review-specific rate received by the companies not selected by Commerce for individual examination in this review (referred to herein as the “non-selected respondents’ rate”). See PrimeSource’s MJAR at 13–42; Consol. Pls.’ MJAR at 2–6. Plaintiffs request remand to the agency for the determination of a new rate to be applied to the non-selected respondents. See PrimeSource’s MJAR at 42–43; Consol. Pls.’ MJAR at 6. Defendant United States (“the Government”) and Defendant-Intervenor Mid Continent Steel & Wire Inc. (“Mid Continent”) urge the court to sustain the *Final Results*. Def.’s Resp. to Pls.’ Mots. for J. Upon the Agency R. (Def.’s Resp.) at 23, ECF No. 26; Def.-Int. Mid Continent Steel & Wire, Inc.’s Resp. Br. (“Def.-Int.’s Resp.”) at 17, ECF No. 27.

As will be discussed in detail below, while the rates assigned to the mandatory respondents (i.e., the selected respondents) were determined based on adverse facts available (“AFA”), Commerce is not barred from using those rates to determine the non-selected respondents’ rate. As such, resolution of this case in part turns on whether the mandatory respondents may be considered representative of the non-selected respondents. In evaluating this issue, the court considers whether the burden lies on Commerce to affirmatively find that the expected method results in a rate reasonably reflective of the potential dumping margins of the non-selected respondents, or on Plaintiffs to demonstrate that Commerce must depart from the expected method. The court concludes that the burden is on the party seeking a departure from the expected method, in this case, Plaintiffs, and finds that Commerce’s reliance on the expected method is otherwise supported by substantial evidence and in accordance with law. Consequently, the court sustains Commerce’s use of the expected method in calculating the rate for non-selected respondents.

Record (“CR”), ECF No. 17–3. PrimeSource submitted joint appendices containing all record documents cited in the Parties’ respective Rule 56.2 briefs. See Public J.A. (“PJA”), ECF No. 31; Confidential J.A., ECF No. 30 (“CJA”).

BACKGROUND

On July 25, 2014, Commerce initiated an antidumping duty investigation of certain steel nails from various countries. *See Certain Steel Nails From India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 36,019 (Dep't Commerce June 25, 2014) (initiation of less-than-fair-value investigations). Following affirmative determinations by Commerce and the U.S. International Trade Commission, Commerce issued an antidumping duty order on certain steel nails from Taiwan. *See Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015).

On September 9, 2019, Commerce initiated the fourth administrative review of the antidumping duty order covering steel nails from Taiwan. *See Initiation of Antidumping and Countervailing Duty Admin. Review*, 84 Fed. Reg. 47,242, 47,247 (Dep't Commerce Sept. 9, 2019). For this review, Commerce selected two mandatory respondents for individual examination: Bonuts Hardware Logistics Co., LLC (“Bonuts”) and Create Trading Co., Ltd. (“Create”), the two respondent companies that accounted for the largest volume of subject merchandise from Taiwan during the period of review.² *See* I&D Mem. at 9. Commerce issued questionnaires to Bonuts on October 23, 2019, and to Create on October 28, 2019. *Certain Steel Nails From Taiwan*, 85 Fed. Reg. 19,138, 19,138 (Dep't Commerce April 6, 2020) (prelim. results of antidumping duty admin. review and prelim. determination of no shipments; 2018–2019) (“*Prelim. Results*”), and accompanying decision mem. (“*Prelim. Mem.*”) at 2, PR 55, PJA Tab 12. Bonuts did not respond. *See* Prelim. Mem. at 2. Create submitted a letter indicating that it had no reviewable sales during the relevant period such that it was not required to respond to the questionnaire. *Id.* at 2 n.10. Commerce accordingly “excused” Create from responding to the questionnaire and selected another respondent to individually examine. *Id.* at 2.

To replace Create, Commerce selected Pro-Team Coil Nail Enterprise, Inc. (“Pro-Team”), the next-largest respondent exporter by volume, as a new mandatory respondent. *See id.* at 2–3. Pro-Team submitted a letter indicating that it would not respond to the questionnaire. *See id.* at 3.

² 19 U.S.C. § 1677f-1(c)(2) (2018) permits Commerce to select the largest exporters by volume for individual examination when it is “not practicable” for Commerce to determine individual margins for each exporter. These selected exporters are referred to as the “mandatory” respondents. *See* I&D Mem. at 9.

On February 3, 2020, after the statutory deadlines to participate as a voluntary respondent passed, Liang Chyuan, a non-selected respondent exporter of subject merchandise, submitted respondent selection comments to Commerce and indicated that it was “willing and able to submit a response to [Commerce’s ADD] questionnaire in this segment of the proceeding.” I&D Mem. at 20 & n.109 (citations omitted). Liang Chyuan did not, however, submit questionnaire responses. *See id.* Liang Chyuan requested that Commerce use Liang Chyuan’s data from the 2017–2018 administrative review or the non-selected respondents’ rate from a prior review to determine Liang Chyuan’s rate. *Id.* at 19.

Commerce assigned both mandatory respondents preliminary dumping margins of 78.17 percent using AFA due to their failure to respond to the questionnaires.³ *Prelim. Results*, 85 Fed. Reg. at 19,139; *Prelim. Mem.* at 7–9. Commerce also found that Liang Chyuan’s asserted willingness to submit questionnaire responses was insufficient for it to be chosen as a mandatory respondent because “it [was] not the next largest exporter of subject merchandise” and because its asserted “willingness is not a consideration” pursuant to the statutory scheme “unless [the] company has . . . fulfilled all the statutory and regulatory criteria for consideration” as a voluntary respondent. *Prelim. Mem.* at 3–4. Commerce found that Liang Chyuan had not taken the necessary steps to qualify as a voluntary respondent. *Id.* at 4. Commerce further explained that carrying forward a previous review rate for Liang Chyuan was “not a feasible or legally sanctioned methodology.” *Id.*

Commerce used the so-called “expected method” to determine preliminarily the rate applicable to the non-selected respondents: averaging the rates assigned to the mandatory respondents.⁴ *See id.* at 10. This method yielded a 78.17 percent rate for the non-selected respondents, including Liang Chyuan. *Prelim. Results*, 85 Fed. Reg. at 19,139. The rates assigned to the mandatory respondents and the non-selected respondents’ rate remained the same in the *Final Results*. 85 Fed. Reg. at 76,015.

Before the court, Plaintiffs challenge Commerce’s use of the expected method to determine the non-selected respondents’ rate. Plaintiffs argue that because the mandatory respondents’ rates were based

³ AFA rates, as established in the statute, may be determined based on data from the petition, other information placed on the record, or determinations in a prior segment of the proceeding regarding the subject merchandise. 19 U.S.C. § 1677e(b)(2) (2018).

⁴ Commerce refers to its method, throughout the preliminary and final I&D Memoranda, as the “expected method.” *See* I&D Mem. In one instance, Commerce refers to the use of a “simple-average” rather than weighted-average. *Id.* at 10. In this case, the result is the same and this one reference does not affect the court’s analysis.

on AFA, the expected method does not yield results reasonably reflective of the potential dumping margins of the non-selected respondents. PrimeSource’s MJAR at 13–35; Consol. Pls.’ MJAR at 3.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁵ and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

At issue first is whether Commerce’s use of the expected method based on the mandatory respondents’ AFA rates to determine the rate to apply to the non-selected respondents was based on substantial evidence and otherwise in accordance with law. Second, the court examines whether Liang Chyuan was entitled to an individually calculated rate.

I. Use of the Expected Method for Determining the Non-Selected Respondents’ Rate was Lawful

The statute is silent regarding how to determine the rate for companies not selected for individual examination in an administrative review. In such a situation, Commerce looks to 19 U.S.C. § 1673d(c)(5) for guidance, which provides instructions for determining the “all-others rate” in an investigation.⁶ *See, e.g., Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 & n.6 (Fed. Cir. 2016); *see also* I&D Mem. at 10 (discussing 19 U.S.C. § 1673d(c)(5)). Section 1673d(c)(5)(A) provides that the all-others rate assigned to non-examined companies is calculated as the “weighted average of the estimated weighted average dumping margins” assigned to individually examined com-

⁵ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless stated otherwise.

⁶ In nonmarket-economy cases, companies may obtain a “separate rate” by establishing independence from government control. *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373–74 (Fed. Cir. 2013); *Bosun Tools Co. v. United States*, No. 2021–1929, 2022 WL 94172 (Fed. Cir. Jan. 10, 2022) (unpublished). When numerous companies seek separate rates, Commerce will likewise select mandatory respondents and determine a non-selected respondents’ rate for those respondents that have established their independence from government control. *See Bestpak*, 716 F.3d at 1374. Jurisprudence for determining the rate applicable to non-selected, separate rate respondents is relevant to determining non-selected respondents’ rates in a market-economy proceeding. *See id.* at 1373–74 (discussing the market-economy rule alongside the nonmarket-economy rule); *Bosun*, 2022 WL 94172 at *2–3 & n.2 (same).

panies, “excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of the facts available, including AFA].” 19 U.S.C. § 1673d(c)(5)(A).

When the dumping margins assigned to all individually examined companies are zero, *de minimis*, or based on facts available, the statute further provides that Commerce “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” *Id.* § 1673d(c)(5)(B).

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which Congress has approved as an authoritative interpretation of the statute, *id.* § 3512(d), provides an “expected method” to determine the all-others rate in these situations, Uruguay Rounds Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 (“SAA”). When the dumping margins for all individually investigated exporters and producers are determined entirely on the basis of facts available or are zero or *de minimis*, “[t]he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.” *Id.* The SAA further provides that “if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.” *Id.*

Prior litigation surrounding these statutory provisions and corresponding portions of the SAA provides the backdrop to the court’s consideration of this case. First, case law confirms that when Commerce relies on 19 U.S.C. § 1677f-1(c)(2) to select the largest exporters by volume for individual examination, it does so based on a statutorily supported assumption that the data from the largest exporters may be viewed as representative of all exporters. *See Albemarle*, 821 F.3d at 1353; *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (Fed. Cir. 2017). This respondent selection exercise occurs early in the administrative proceeding before questionnaires are issued and is based on the respondents’ export volumes, not the results of the agency’s dumping margin analysis. *See* Respondent Selection Mem. (Oct. 22, 2019) at 4–5, CR 5, PR 29, CJA Tab 2. In other words, the selected respondents are assumed to be representative of the non-selected respondents without regard to whether their

final antidumping duty margin is zero, *de minimis*, based entirely on the use of AFA, or calculated based on the questionnaire responses of the selected respondents. See *Albemarle*, 821 F.3d at 1353; *Bosun*, 2022 WL 94172 at *4.

Second, this assumption of representativeness that arises with Commerce's reliance on 19 U.S.C. § 1677f-1(c)(2) carries weight when Commerce determines the rate applicable to non-selected respondents. As mentioned above, Commerce determines the rate for non-selected respondents consistent with 19 U.S.C. § 1673d(c)(5). Thus, in the first instance, Commerce will weight-average the above-*de minimis* calculated rates to determine the non-selected respondent rate. 19 U.S.C. § 1673d(c)(5)(A). If, however, the rates for all selected respondents are zero, *de minimis*, or based on facts available, the SAA provides that the expected method is for Commerce to weight-average such rates to determine the non-selected respondents' rate. SAA at 873, reprinted in 1994 U.S.C.C.A.N. at 4201. In other words, it is *expected* that zero, *de minimis*, and facts available rates will be used in determining the non-selected respondents' rate. See *id.*; *Bosun*, 2022 WL 94172, at *4 (rejecting the appellants' argument that Commerce unreasonably based the separate rate, in part, on an AFA rate as "expressly foreclosed by statute").

Albemarle and *Changzhou Hawd* confirm that the expected method is the default method and that the burden of proof lies with the party seeking to depart from the expected method (or with Commerce as the case may be). For example, in *Albemarle*, Commerce sought to deviate from the expected method when the mandatory respondents were both found to have *de minimis* margins. See *Albemarle*, 821 F.3d at 1353. Instead of weight-averaging those results, Commerce decided to "carry[] forward" the results of prior administrative reviews to determine the rate for non-selected respondents. *Id.* In reviewing that determination, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that "[t]he burden is not on the separate respondents to show that their dumping is the same as that of the individually examined respondents. Rather, Commerce must find based on substantial evidence that there is a reasonable basis for concluding that the separate respondents' dumping is different." *Id.*

The *Albemarle* court outlined two circumstances under which Commerce may depart from the expected methodology and carry forward a prior rate for any particular respondent. First, the court found that Commerce needed some contemporaneous data to establish that the market and margins relevant to the subject merchandise had not changed such that the prior rates could be considered reflective of

current rates. *Id.* at 1357. Second, in the AFA context, “where Commerce is allowed to consider deterrence as a factor,” the court found that “Commerce may presume that ‘a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent review.’” *Id.* at 1357–58 (quoting *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010); citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002)). The court further stated that it has “upheld this presumption because ‘if it were not so, the [exporter], knowing the rule, would have produced *current* information showing the margins to be less.’” *Id.* at 1358 (quoting *KYD*, 607 F.3d at 766). Other than in these two circumstances, “[t]here is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period,” thus reinforcing the notion that the expected method is the default. *Id.* at 1356.

One year after the court’s decision in *Albemarle*, the Federal Circuit again confirmed the relevance of the assumed representativeness of the mandatory respondents in *Changzhou Hawd*. See *Changzhou Hawd*, 848 F.3d at 1012 (“The very fact that the statute contemplates using data from the largest volume exporters suggests an assumption that those data can be viewed as representative of all exporters.”). There, the court again found that in order to depart from the expected method, Commerce must identify substantial evidence that the non-selected respondents’ dumping was different from that of the mandatory respondents. See *id.* (“[T]he presumption of representativeness may be overcome . . . [with] ‘substantial evidence that there is a reasonable basis for concluding that the separate respondents’ dumping is different.’”) (quoting *Albemarle*, 821 F.3d at 1353).

Recently, in *Bosun*, the Federal Circuit confirmed that the representativeness of the selected respondents is independent of the results of Commerce’s dumping margin analysis.⁷ See 2022 WL 94172, at *4. In the review underlying *Bosun*, Commerce selected the two largest respondents for examination and calculated a *de minimis* dumping margin for one respondent while basing the other respondent’s rate on AFA. *Id.* at *2–3. Commerce determined the rate for the non-selected respondents by finding the simple average of these two rates.⁸ See *id.* at *3. The *Bosun* court affirmed Commerce’s inclusion of the AFA-based rate in the average assigned to the non-selected

⁷ Although *Bosun* is an unpublished opinion, as discussed herein, this court finds the opinion helpful to its analysis because the reasoning is consistent with and builds on the Federal Circuit’s prior reasoning in *Albemarle* and *Changzhou Hawd* and is otherwise persuasive.

⁸ By using the simple average, Commerce diverged from the expected method, which calls for using the weighted average of the selected respondents’ rates. SAA at 873, *reprinted in*

respondents. *See id.* at *4. In so doing, the court recalled its discussion in *Albemarle* regarding the “general assumption underlying the statutory framework”—specifically, the assumption that data from the largest volume exporters may be viewed as representative of all exporters, *id.* (quoting *Albemarle*, 821 F.3d at 1353)—and went on to find that “although *Albemarle* concerned a case with *de minimis* rates rather than AFA rates, its reasoning is equally applicable here; the same statutory language in [section] 1673d(c)(5)(B) that permits use of *de minimis* rates also permits use of AFA rates,”⁹ *id.* (emphasis added).

These cases all recognize an important assumption that is built into Commerce’s statutory authority to engage in respondent selection: that the largest exporters by volume are assumed to be representative of the non-selected respondents. Consistent with this assumption, the cases also stand for the proposition that Commerce is expected to use the mandatory respondents’ rates to determine the antidumping duty rate to be assigned to the non-selected respondents.

These concepts, representativeness and expectedness, are connected. Representativeness allows Commerce to select certain respondents for individual examination and, in so doing, decline to individually examine other respondents. By allowing Commerce to focus its resources on certain respondents, the statute necessarily creates the assumption of representativeness because Commerce often will lack further information about the non-selected respondents. *See Albemarle*, 821 F.3d at 1353. Commerce is not otherwise required to collect information about the non-selected respondents because Commerce is permitted, in fact, expected, to treat the mandatory respondents as representative of the non-selected respondents when it determines the non-selected respondents’ rate.¹⁰

1994 U.S.C.C.A.N. at 4201. Commerce may have used a simple average of the two respondents’ rates (in other words, giving equal weight to each rate) in order to avoid revealing the actual volume of imports into the United States by the cooperating respondent if such information was considered business proprietary. Regardless, the Federal Circuit did not fault Commerce’s use of a simple average.

⁹ Plaintiffs repeatedly cite *Yangzhou Bestpak*, 716 F.3d 1370, to support their assertion that Commerce must demonstrate that the rate yielded by the expected method reasonably reflects the potential dumping margins of the non-selected respondents. *See* PrimeSource’s MJAR at 7, 11–12. However, *Bosun* interprets *Bestpak*’s holding narrowly, emphasizing that *Bestpak*, which addressed a challenge to the results of an antidumping duty investigation, “simply found that Commerce’s methodology was unreasonable ‘as applied,’ given the lack of data.” 2022 WL 94172, at *4. In this case, as in *Bosun*, Commerce examined the existing data from prior administrative reviews and found that the record evidence did not support a finding that the expected method did not produce a rate that reasonably reflected the potential dumping of the non-selected respondents. *See infra*, pp. 18–21.

¹⁰ Plaintiffs argue that, despite all this, AFA rates are still impermissible for use in the expected method because they cannot be representative of current non-selected

This assumption of representativeness, combined with the expectation that Commerce will treat the mandatory respondents as representative of the non-selected respondents, provides a basis for understanding that part of the SAA language upon which PrimeSource focuses: “[I]f [the expected] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-[examined] exporters or producers, Commerce may use other reasonable methods.” SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201. PrimeSource suggests that this language places an affirmative burden on Commerce to find, based on substantial evidence, that the expected method produces a rate that *is* reasonably reflective of the potential dumping by non-selected respondents. *See* PrimeSource’s MJAR at 16. The court finds that the statute, SAA, and relevant opinions of the Federal Circuit do not support placing such a burden on Commerce.

As discussed above, the statute clearly permits Commerce to engage in a respondent selection process pursuant to 19 U.S.C. § 1677f-1(c) when certain conditions have been met. Commerce engaged in that process in this administrative review and no party challenges that decision. Having determined to examine the largest exporters by volume in this review, the statute permits Commerce to proceed with the review without requiring additional information from the non-selected respondents. *See, e.g., Changzhou Hawd*, 848 F.3d at 1012 (discussing the statutory authority to select respondents rather than examining every exporter). Thus, interpreting the SAA to require Commerce to nevertheless engage in a data collection exercise with the non-selected respondents in order to determine their “potential dumping margins” would be inconsistent with the language of 19 U.S.C. § 1677f-1(c) expressly permitting Commerce to “limit[] its examination” to the largest exporters and producers by volume. 19 U.S.C. § 1677f-1(c)(2). Such an interpretation would defeat the purpose of the respondent selection process. Nothing in the statute, SAA, or jurisprudence suggests that such a burden exists.

respondents’ rates. PrimeSource’s MJAR at 14–21. However, Plaintiffs fail to establish that the use of AFA to determine the mandatory respondents’ rates in any way detracts from the presumption of representativeness. While Plaintiffs seek to differentiate the use of AFA rates in the expected method from the use of *de minimis* or zero rates by characterizing AFA rates as “punitive,” the Federal Circuit has found that AFA rates may be representative of actual dumping because, “if it were not so, the [mandatory respondent], knowing the rule, would have produced *current* information showing the margin to be less.” *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990). Moreover, the absence of any opposition to the use of AFA in this review by a mandatory respondent suggests that the AFA rates assigned to the mandatory respondents were probative of their dumping—further justifying these rates as representative. *See id.* *Bosun* also clearly resolves this issue in the context of the expected method: AFA rates are permissible in calculating the rate applied to the non-selected respondents. *Bosun*, 2022 WL 94172, at *4 (finding that AFA rates are acceptable inputs to the expected method for calculating all-others rates).

To the contrary, the courts have long recognized that the burden of establishing relevant facts may properly be assigned to the party in control of the information necessary to establish those facts. *See, e.g., Rhone Poulenc*, 899 F.2d at 1190–91 (placing “the burden of production on the [party] which has in its possession the information capable of rebutting the agency’s inference”). In this case, the non-selected respondents are in control of the information that would establish whether applying the expected method based on the rates of the mandatory respondents would not reasonably reflect the potential dumping margins of those non-selected respondents. Thus, the court finds that the non-selected respondents bear the burden of providing evidence that the results of the expected method would not reasonably reflect the potential dumping margins of the non-selected respondents.

Accordingly, the court turns to whether Plaintiffs have provided substantial evidence to rebut the presumption of representativeness and thereby justify deviating from the expected method. Commerce found that the “expected method is reasonable here because the record evidence does not rebut the presumption that the mandatory respondents are representative.” I&D Mem. at 9. While Plaintiffs argue that substantial evidence rebutted the presumption of representativeness, PrimeSource’s MJAR at 13– 34; Consol. Pl.’s MJAR at 3–5, Plaintiffs point to no evidence from this period of review to support their assertion that the expected method result was not reasonably reflective of their actual margins, *see* PrimeSource’s MJAR at 27–34 (arguing that AFA rates are punitive and that past reviews yielded rates that were more reflective of current rates). Here, all respondents were aware of the AFA rate from prior reviews that would likely be utilized in the case of non-participation by one or more mandatory respondents and its potential inclusion in the determination of the non-selected respondents’ rate. *See* I&D Mem. at 14–15. Nevertheless, no non-selected respondent provided a timely voluntary questionnaire response or timely evidence that the mandatory respondents were in any way not representative of the remaining respondents (such as operating in a different market segment (“commodity” versus “high-end niche”) or other evidence that might provide the agency with cause to question the representativeness of the mandatory respondents). Moreover, there is not sufficient evidence to indicate that the prior, lower rates to which Plaintiffs point are more reflective of current rates than the rate determined by the expected method.

Bosun offers some considerations for evaluating Commerce’s analysis of the rates from prior reviews. In *Bosun*, as plaintiffs do here, the appellant argued that the rate applied to the non-selected respondents diverged from a “trend” of prior low rates. 2022 WL 94172, at *5. The Federal Circuit considered the individual rates determined for the appellant in the past and found that they were above *de minimis* and, in fact, trending upwards; it found Commerce’s decision to weigh the most recent rate most heavily to be reasonable; and it acknowledged Commerce’s consideration and rejection of earlier prior rates that, because they were lower, arguably detracted from the rate assigned to *Bosun*. *See id.* at *5–6.

Here, Commerce rejected Plaintiffs’ suggestion of a pattern of lower rates, instead finding a history of AFA usage in previous reviews. *See* I&D Mem. at 14–15. While the non-selected respondents asserted that “calculated margins ranged from zero percent to 27.69 percent, which [respondents] consider to be ‘low’ margins,” *id.* at 14, Commerce noted that the respondents “omitted any mention of the rates assigned in the history of the proceeding that were based on the 78.17 percent AFA rate,” whereas Commerce found that “more than half of the reviews contained [a] determination[] based on” AFA, *id.* at 14. Thus, for Commerce, there was no evidence that the 78.17 percent margins had less probative value than the so-called “low” rates to which respondents pointed. *See id.* at 14–15. As Commerce’s analysis highlights, examining only the calculated margins and excluding from consideration the AFA-based margins would not have yielded a full picture of the historical trends.

Commerce also did not ignore the previous antidumping rates. Commerce explained that past rates have been inconsistent from review to review, and that “if there is any pattern from segment-to-segment of the behavior of examined respondents, that pattern demonstrates that, most of the time, the mandatory respondents have failed to cooperate and have been assigned a rate based on AFA.” *Id.* at 14. Commerce relied on this assessment to find that there was no basis on which to find that past calculated rates are representative, because there was fluctuation from review to review. *See id.* at 14–15. For example, Commerce pointed to the fact that Pro-Team, a mandatory respondent in this and the previous review, received an AFA rate in this review but a calculated rate in the preceding review. *Id.* at 14. Similarly, Unicatch Industrial Co., Ltd. (“Unicatch”), “another frequent mandatory respondent” that was not under individual review here, was assigned rates of 6.16 percent and 27.69 percent in subsequent reviews—an increase of 350 percent from one review to the next. *Id.* at 15. Moreover, Bonuts received AFA rates in the first,

second, and fourth administrative reviews. *Id.* at 14. The table below demonstrates this lack of consistency—and the lack of consistently “low” rates—in frequent mandatory respondents’ rates over the course of the reviews:¹¹

| | Pro-Team | Bonuts | Unicatch |
|---------------|---------------------|---------------|-----------------|
| Investigation | 2.16% ¹² | | |
| POR1 | | 78.17% | 78.17% |
| POR2 | 0% | 78.17% | 6.16% |
| POR3 | 6.72% ¹³ | | 27.69% |
| POR4 | 78.17% | 78.17% | |

These values support Commerce’s conclusion that the rates fluctuated significantly from review to review and, thus, that looking to past reviews for evidence of current dumping lacks a logical foundation. Absent any consistency from review to review, Plaintiffs’ arguments in favor of using rates from past reviews are unconvincing. Commerce’s determination not to use past rates was therefore reasonable.

Commerce also noted that in each segment of this proceeding, the mandatory respondents’ rates have formed the basis for any non-selected respondents’ rate. *Id.* at 15. Moreover, “73 of 75 of the non-examined companies have never been examined in any segment of the proceeding,” and “there is no evidence on this record or any other record that the 78.17 percent rate does not reflect their commercial reality.” *Id.* In other words, the relevant data from past reviews was severely limited. *See id.* Commerce found that Plaintiffs presented no compelling argument for why such limited, non-contemporaneous data would be more representative than margins determined in the present review. *See id.*

The above analysis indicates that Commerce’s use of the expected method was supported by substantial evidence and in accordance with the law. As required by the substantial evidence standard, Commerce engaged with the data from past reviews and considered its relevance to the present review, finding that the lack of consistency in prior rates made past review data unusable for determining present rates. Commerce examined whether prior rates might be representa-

¹¹ These values, unless otherwise indicated, are extracted from the analysis in the I&D Memorandum on pages 14 and 15.

¹² *Certain Steel Nails From Taiwan*, 82 Fed. Reg. 55,090, 55,090 (Dep’t Commerce Nov. 20, 2017) (notice of court decision not in harmony with final determination in less than fair value investigation and notice of amend. final determination).

¹³ *Certain Steel Nails From Taiwan*, 85 Fed. Reg. 14,635, 14,636 (Dep’t Commerce Mar. 13, 2020) (final results of antidumping duty admin. review and determination of no shipments; 2017–2018).

tive of current dumping rates, and it found that there was insufficient evidence on the record to rebut the presumed representativeness of the mandatory respondents' rates from this review. Thus, Plaintiffs' arguments in favor of carrying forward prior rates as a preferable method are unpersuasive. Accordingly, the court sustains Commerce's determination of the non-selected respondents' rate based on the expected method.

II. Liang Chyuan Is Not Entitled to Different Status

PrimeSource attempts to distinguish Liang Chyuan from the other non-selected respondents in two ways: first, by noting that Liang Chyuan was "willing and able to submit a response," and, second, that Liang Chyuan had been a respondent in a previous review and received a lower rate. PrimeSource's MJAR at 26.

The Government asserts that Liang Chyuan's cooperation in one prior review is "not sufficient evidence to divert from the expected method and apply [Liang Chyuan's] rate from the prior review, particularly given the fluctuating rates of Pro-Team and Unicatch, which have both received AFA in certain segments but not others." Def.'s Resp. at 19 (citing I&D Mem. at 19); *see also* Def.-Int.'s Resp. at 10. Further, the Government asserts that Liang Chyuan's willingness to submit a questionnaire response does not by itself entitle it to an individual rate because it did not participate as a voluntary respondent. *See* Def.'s Resp. at 19; *see also* Def.-Int.'s Resp. at 10.

PrimeSource fails to distinguish Liang Chyuan from the other non-selected respondents. Non-selected respondent rates are often applied to multiple non-selected respondents—indeed, that is the purpose of these rates. *See Bosun*, 2022 WL 94172, at *2 ("After Commerce determines the rates for the mandatory respondents, it then assigns a separate rate to the nonindividually examined respondents . . ."). Non-selected respondents, as a general matter, are not entitled to individually determined rates; however, they may qualify as voluntary respondents and thereby receive individually determined rates if they provide necessary information in a timely fashion. *See* 19 U.S.C. § 1677m(a)(1)(A)(i).

To qualify as a voluntary respondent, a company must respond to the same questionnaire issued to the mandatory respondents within the same timeframe. 19 U.S.C. § 1677m(a)(1)(A)(i). Liang Chyuan did not do so. I&D Mem. at 20. PrimeSource attempts to analogize Liang Chyuan's status to that of a voluntary respondent simply because Liang Chyuan expressed a willingness to submit responses to the questionnaire. PrimeSource's MJAR at 26. However, Liang Chyuan was not required to request or await Commerce's approval to file a

timely voluntary response. *See* 19 U.S.C. § 1677m(a)(1)(A)(i). Moreover, Liang Chyuan did not express its willingness to participate until February 3, 2020, roughly two months after the deadlines for the mandatory respondents to respond to the agency’s questionnaires. I&D Mem. at 20 & nn.109–10.

While Liang Chyuan participated as a respondent in one prior review in which it received a calculated margin based on its sales during that period of review, *see id.* at 19, that fact does not entitle Liang Chyuan to retain that calculated rate in the present review. As Commerce noted, “each administrative review is a separate segment of proceedings with its own unique facts.” *Id.* at 19 n.103 (quoting *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005)). In addition, “there is no record evidence substantiating [Liang Chyuan’s] claim that it would have received the same result in this review as it did in a previous review, had it been selected for individual examination.” *Id.* at 20. In sum, Commerce was justified in finding that Liang Chyuan was not entitled to an individual rate because Liang Chyuan did not take the necessary steps to qualify for an individual rate or otherwise establish that the non-selected respondent rate should not apply.

CONCLUSION

Based on the foregoing, the court will sustain Commerce’s *Final Results*. Judgment will enter accordingly.

Dated: June 16, 2022

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

Slip Op. 22–74

SHANGHAI TAINAI BEARING CO., LTD. AND C&U AMERICAS, LLC, Plaintiff,
and PRECISION COMPONENTS, INC., XINCHANG NEWSUN XINTIANLONG
PRECISION BEARING MANUFACTURING CO., LTD, and HEBEI XINTAI
BEARING FORGING CO., LTD, Consolidated Plaintiffs v. UNITED STATES,
Defendant.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:22-cv-00038

[Denying Plaintiffs’ Motion for injunctive relief.]

Dated: June 17, 2022

David J. Craven, Craven Trade Law LLC, of Chicago, Illinois, for the Plaintiff.

Kelly A. Krystyniak, Trial Attorney, U.S. Department of Justice, of Washington, D.C., for the Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director, U.S. Department of Justice, Commercial Litigation Branch, and *Jesus N. Saenz*, U.S. Department of Commerce, Office of the Chief Counsel for Trade Civil Division Enforcement and Compliance.

OPINION

Vaden, Judge

On February 24, 2022, Plaintiffs Shanghai Tainai Bearing Co., Ltd. and C&U Americas LLC (collectively, Plaintiffs) filed a twelve-count complaint challenging certain aspects of the Final Results published by the Department of Commerce (Commerce) in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China*, 87 Fed. Reg. 1,120 (Jan. 10, 2022). On the consent of all parties, Judge Restani issued an order enjoining liquidation on February 28, 2022. ECF No. 9. Pursuant to CIT Rules 7 and 65(a), Plaintiffs now seek a further injunction. Plaintiffs move to enjoin Commerce and U.S. Customs and Border Protection (Customs) from collecting cash deposits at the rate set forth in the contested Final Results. In the alternative, Plaintiffs submit a petition for a writ of mandamus to the Court, seeking the same outcome. They propose an indefinite duration for this remedy, which they request cease only on the completion of this proceeding, including any remand or appeal therefrom. The Government opposes this remedy, Plaintiffs' preferred duration for it, and the validity of both the injunction and alternative writ sought. For the reasons that follow, the Motion to enjoin Commerce and Customs from requiring Plaintiffs to pay cash deposits is **DENIED**. Plaintiffs' request for a writ of mandamus is also **DENIED**.

BACKGROUND

I. Procedural History

On August 6, 2020, Commerce began an administrative review of the antidumping duty order covering tapered roller bearings (TRBs) from China as applied to the period from June 1, 2019, to May 31, 2020. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 54,983, 54,990 (Dep't of Commerce Sept. 3, 2020); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 47,731 (Dep't of Commerce Aug. 6, 2020) (setting out Initiation Notice). Commerce determined that it could examine one company to achieve the investigation's goals, Plaintiff Shanghai Tainai Bearing Co., Ltd. (Shang-

hai Tainai). It selected the company because of the volume of its entries of the covered goods — it is the largest exporter of TRBs from China. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 86 Fed. Reg. 36,099 (Dep't of Commerce July 8, 2021) (Prelim. Results) (P.R. 189) and accompanying Preliminary Decision Memorandum (PDM) at 2 (P.R. 181).

In early July 2021, Commerce provided preliminary results. Those results indicated Commerce observed several “deficiencies and inconsistencies” among documents from Shanghai Tainai’s reporting of its data regarding factors of production. Def.’s Resp. at 4; *see* PDM at 15. Consequently, Commerce used facts available to account for Plaintiff’s inaccurately reported factors of production data; Commerce did not apply adverse inferences at this early stage. PDM at 15–16. Commerce also noted that mandatory information remained missing from Shanghai Tainai’s completed questionnaire responses. Among the most notable missing facts were “direct input bills of materials . . . for production of subject merchandise,” which Plaintiff needed to collect from its suppliers. *Id.* This information is a crucial baseline data set to validate Shanghai Tainai’s factors of production. *Id.* Nonetheless, Commerce proceeded to calculate a preliminary, estimated, weighted-average dumping margin — 36.75% — by relying on the factors of production reported by Plaintiff, sans substantiating documentation. Prelim. Results, 86 Fed. Reg. at 36,100.

Seeking to resolve these gaps in reported information, Commerce provided Shanghai Tainai with a Supplemental Questionnaire (P.R. 191) before issuing its Final Results. Plaintiff failed to respond. Commerce also sent similar questionnaires to Shanghai Tainai’s unaffiliated suppliers, who were similarly non-responsive. IDM at 7; *see also* Commerce’s Request for Information Letter (Aug. 17, 2021) (P.R. 192).

On January 10, 2022, Commerce provided Final Results for its investigation. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 87 Fed. Reg. 1,120 (Dep't of Commerce Jan. 10, 2022) (Final Results) (P.R. 222); *see also* accompanying Issues and Decision Memorandum (IDM) (P.R. 214). In its report, Commerce found that Shanghai Tainai’s submitted allocation methodology could no longer be used to determine factors of production based on goods purchased from unaffiliated suppliers because the third parties had not cooperated with the Department. To substantiate Shanghai Tainai’s claims, Commerce needed information regarding the factors of production from these unaffiliated suppliers. IDM at 10–14.

Because of this, Commerce applied partial adverse facts available for the missing factors of production data. This required supplanting Plaintiff's proffered data with similar information provided by its affiliated suppliers. *Id.* Commerce's justification lay in its conclusion that Shanghai Tainai could "induce compliance with requests" for data in the future. "Commerce chose Tainai as a mandatory respondent in this review because it accounted for the largest volume of entries of subject merchandise"; and because of "the quantity of TRBs that it purchased from suppliers, it is reasonable to conclude that [Shanghai] Tainai is an important customer to its Chinese TRB suppliers." IDM at 13. This status put Plaintiff "in a position to exercise its leverage over its TRB suppliers to induce them to cooperate." *Id.*

The magnitude of the missing data — it corresponded to the vast majority of subject merchandise — produced a much different rate than the one calculated according to Shanghai Tainai's estimated costs, which had appeared in the preliminary determination. *See Tainai Calculation Memorandum* at Attachment III, tab Exhibit SSD-1.1 (noting that nearly all of the reported information would have come from unaffiliated suppliers) (P.R. 216–17, C.R. 209–10). Commerce observed this derives, in part, from Shanghai Tainai's position in the production of TRBs. Plaintiff does not develop or add value to the "finishing and grinding stages in the TRBs supply chain"; it buys components after those stages. IDM at 11. For that reason, the "extrapolation of data from certain affiliated suppliers to account for its unaffiliated suppliers' [factors of production] usage rates is nothing more than speculation," fundamentally undermining Shanghai Tainai's allocation methodology. *Id.* Given these circumstances, Commerce applied a partial adverse inference to the facts available to produce a weighted-average dumping margin of 538.79 percent. Final Results 87 Fed. Reg. at 1,121. This result prompted Plaintiff's lawsuit, which challenges the allegedly incorrect calculations employed to arrive at Commerce's Final Results. ECF Nos. 1, 7.

II. Legal Background

The Tariff Act of 1930 authorizes Commerce to investigate alleged dumping activity. If documented, this activity is penalized by anti-dumping duties on the unfairly priced goods. *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). The statute defines dumping as the sale of products in the United States by a foreign company at prices below their fair value. 19 U.S.C. § 1677b(a).

To impose antidumping duties, Commerce assesses whether goods are being sold at less than their fair value. 19 U.S.C. § 1673. If dumping has occurred, the International Trade Commission (ITC)

then evaluates whether American domestic industries producing like goods are materially injured or threatened with material injury. The ITC also determines whether the domestic growth of industries producing the same goods is threatened by the sale of the dumped product. *Id.* If dumping is documented to have “materially injured” or “threatened with material injury” a domestic industry, or “materially retarded” the establishment of a domestic industry, Commerce proceeds to impose antidumping duties. 19 U.S.C. § 1673(2)(A)–(B).

For individual companies under investigation, Commerce’s action vis-à-vis duties begins when the Department preliminarily concludes that duties are appropriate. Its staff then publishes a detailed preliminary determination establishing the duty rates assessed for specific cases, providing baseline explanations for its findings. 19 U.S.C. § 1673b(d)(1). Afterward, Commerce orders exporters to post security for subject merchandise. Liquidation is suspended on “all entries of merchandise subject to the [preliminary] determination which are entered, or withdrawn from warehouse, for consumption on or after” publication of the preliminary determination or sixty days from publication of notice of initiation of the investigation. 19 U.S.C. § 1673b(d)(2)(A)–(B). The duty rates provided in the preliminary determination and a halt on liquidation are imposed for a minimum of four and a maximum of six months. 19 U.S.C. § 1673b(d)(3). Commerce then provides a final determination of duty rates. If its initial determination is sustained, the suspension of liquidation applied to subject merchandise remains in place through the process of administrative review. *See* 19 U.S.C. § 1673d(c)(4).

Affected businesses may face hardships because of the “retrospective’ assessment system” adopted by the United States. 19 C.F.R. § 351.213(a). This system requires that “final liability for antidumping . . . duties is determined after merchandise is imported.” *Id.* Final duty liability is decided following an administrative review. *Id.* An antidumping order may be reviewed following a request submitted after the first anniversary of its publication. 19 C.F.R. § 351.213(a)(b)(1). The first administrative review examines the period from the commencement of suspension of liquidation to the month immediately prior to the anniversary month. In the case of subsequent reviews, the evaluation takes place one year immediately prior to the anniversary month. 19 C.F.R. § 351.213(e)(1). Once these administrative reviews are completed, Commerce publishes the final applicable duty rates. Customs then liquidates relevant entries within six months. 19 U.S.C. § 1673(a)(1).

Distinct from preliminary injunctions to suspend liquidation, enjoining the collection of cash deposits is a separate and unusual

remedy. The former seeks to preserve a party's litigation options and ensure a full and fair review of duty determinations before liquidation. The statute expressly contemplates these steps. See 19 U.S.C. § 1516a(c)(2) (providing that the CIT “may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission”). However, the latter remedy is rarer and harder to obtain because the statutory and regulatory antidumping duty regime envisions a stricter application of the procedure. See 19 U.S.C. §§ 1671f, 1673f, 1677g; 19 C.F.R. § 351.205(d) (providing for importers to pay cash deposits higher than what is finally determined they owe, relying on subsequent mechanisms to return excess collections). Congress chose this prepayment process to protect the public fisc and to ensure the Government receives the tariffs due. See 19 U.S.C. § 1673b(d)(1)(B). The deposit requirement remains even in instances where the potential liability borne by a party remains uncertain. *Id.* (requiring collection of cash deposits on affirmative preliminary determination in antidumping duty investigation); 19 U.S.C. §1673d(c)(1)(B)(ii) (making the continuation of cash deposits obligatory on the issuance of an affirmative final determination for antidumping duty investigations). The distinction between liquidation and the statutory deposit requirement — reflected in the likelihood of successfully enjoining each — is grounded in the text of relevant statutes as well as longstanding CIT jurisprudence.

III. Prior Injunctive Relief

The Court takes special notice in this case of the injunctive relief already provided to Plaintiffs. Just over two weeks after Shanghai Tainai commenced the present action, on February 8, 2022, and just four days after it filed its Complaint, on February 24, 2022, Judge Restani enjoined liquidation. The basis for Plaintiffs' Motion and proffered writ is their insistence this initial equitable remedy remains insufficient. To avoid permanent harm to its business interests, Shanghai Tainai now seeks a preliminary injunction preventing Customs from collecting cash deposits. Like the injunction obtained against liquidation, Shanghai Tainai seeks this additional equitable relief pending the completion of proceedings in the Court of International Trade arising from its challenge to the Final Results.

JURISDICTION AND STANDARD OF REVIEW

The Court maintains adjudicatory authority over the underlying action. 28 U.S.C. § 1581(c). “The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under sec-

tion 516A or 517 of the Tariff Act of 1930.” *Id.* At this early stage in the case, Plaintiffs seek a second preliminary injunction, an extraordinary form of equitable relief. It shall issue only where the movant establishes that: (1) it will suffer irreparable harm absent the requested relief; (2) it is likely to succeed on the merits of its underlying claim; (3) the balance of the hardships favors the movant; and (4) the public interest would be served by the injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citations omitted).

In the Federal Circuit, the fulfillment of the four factors bears a complex relationship to the outcome determined by the Court. “[N]o one factor, taken individually, is necessarily dispositive.” *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). However, “irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits and irreparable harm.” *Reebok Int’l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994); *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (refusing to grant plaintiff preliminary relief “unless it establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm.”) (emphasis in original) (citation omitted). Because “the weakness of the showing regarding one factor may be overborne by the strength of the others,” *FMC Corp.*, 3 F.3d at 427, “the more the balance of irreparable harm inclines in the plaintiff’s favor, the smaller the likelihood of prevailing on the merits [plaintiffs] need show in order to get the injunction.” *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (quoting *Kowalski v. Chi. Trib. Co.*, 854 F.2d 168, 170 (7th Cir. 1988)).

Nonetheless, “an [adequate] showing on one preliminary injunction factor does not warrant injunctive relief in light of a weak showing on other factors.” *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 100 (Fed. Cir. 2014) (citing *Winter*, 555 U.S. at 22). *Cf. Winter*, 555 U.S. at 26 (denying injunctive relief because of public interest in national security); *Sumecht NA, Inc. v. United States*, 331 F. Supp. 3d 1408, 1412 (CIT 2018), *aff’d*, 923 F.3d 1340 (Fed. Cir. 2019) (lacking evidence of immediate irreparable harm compels denial of preliminary injunction); *Otter Prods., LLC v. United States*, 37 F. Supp. 3d 1306, 1316 (failing to establish irreparable harm sufficient to deny injunction).

DISCUSSION

I. Preliminary Injunction

a. Irreparable Harm

For Plaintiffs to prevail, they must establish irreparable injury is likely to accrue to them immediately if the requested equitable relief is not issued. *Winter*, 555 U.S. at 22. Harm is found to be irreparable if “no damages payment, however great,” could redress it. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). Imminence of injury is also required, *Zenith Radio*, 710 F.2d at 809, yet this immediacy does not equate to a demonstration that the harm complained of has already occurred. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (holding movant must show a “cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive”). A moving party must put forward more than mere “speculative” evidence to demonstrate an “immediate and viable” likelihood of injury. *Otter*, 37 F. Supp. 3d at 1315 (quoting *Kwo Lee, Inc. v. United States*, 24 F. Supp. 3d 1322, 1326 (CIT 2014)); *Sumecht*, 331 F. Supp. 3d at 1412 (citing *Zenith Radio*, 710 F.2d at 809). To analyze whether Plaintiffs have met this “extremely heavy burden,” *Shandong Huarong Gen. Grp. v. United States*, 122 F. Supp.2d 143, 146 (CIT 2000), the Court will assess “the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief.” *Sunprime Inc. v. United States*, 181 F. Supp. 3d 1322, 1331 (CIT 2016).

Bare financial losses neither constitute nor substantiate irreparable harm, even when they signal economic damage to an entity. This derives in part from the presumed effectiveness of corrective relief for monetary injury, provided by a Court order at a later date. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) (noting that “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm”); *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1355 (CIT 2002) (holding “economic injury” insufficient to establish irreparable harm). The *Corus* Court found, for example, that *plans* to close a plant to avoid “operat[ing] at a loss,” did not establish irreparable harm because there was no “danger of imminent closure” of the plant. 217 F. Supp. 2d at 1355. On the other end of the spectrum, bankruptcy stemming from a substantial decline of business is grave enough to demonstrate

the inadequacy of later corrective relief. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (“Certainly [bankruptcy] sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless.”); *McAfee v. United States*, 3 CIT 20, 24 (1982) (“It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the very loss of the business itself.”). Generally, a movant must show “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities” severe enough to represent an imminent threat to the continuation of the business. *Celsis In Vitro*, 664 F.3d at 930 (citing *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008)).

Plaintiffs’ Motion fails to meet this high standard. Before addressing the specifics of their arguments, the Court observes the tenuous link established between harm done to Shanghai Tainai as opposed to harm done to C&U Americas. Evidence of one or the other does not necessarily equate to a shared or reciprocal impact on both. In their Complaint, the relationship between Shanghai Tainai and C&U Americas is stated in only the loosest terms:

Plaintiff C&U Americas, Llc (“C&U”) is a Corporation organized under the laws of the United States. Plaintiff Tainai produced Tapered Roller Bearings in the People’s Republic and exported the same to the United States. Plaintiff C&U imported, distributed and sold Tapered Roller Bearings in the United States. Both parties were active participants in the Administrative Review and Tainai was designated as a mandatory respondent.

Compl. at ¶ 3, ECF No. 7. These statements remain largely unelaborated, despite ample opportunity for the parties provide the Court with necessary detail.¹

The relationship remains a recurring mystery in the evidence put forward to support Plaintiffs’ request for injunctive relief. For example, Plaintiffs rely heavily on a four-page affidavit by Mr. Jason Stocker, president of C&U Americas. ECF No. 17–1 at 20–23. Mr. Stocker’s declaration leaves the Court to guess about the two entities’ business dealings because he fails even to mention Shanghai Tainai or how its specific plight will impact the business he leads. Defendant notes that, “[w]hile Tainai did place a ‘sales agreement’ between it and [C&U Americas] on the record, (C.R. 31, 36),” Plaintiffs’ “motion fails entirely to explain how [C&U Americas] will be affected by the

¹ The Court cannot hypothesize the nature of this relationship. It offered Plaintiffs’ counsel the opportunity to submit a reply brief when the Government questioned the specifics of the relationship. Plaintiffs’ counsel declined despite bearing the burden of proof of entitlement to the requested relief. *See Winter*, 555 U.S. at 22.

rate assigned to Tainai, including the extent of that affect.” Def.’s Resp. at 9, ECF No. 19. Mere implied association via the global marketplace does not answer this query.

Regarding harm to C&U Americas, Mr. Stocker’s declaration provides some useful, if inadequate, information in support of the potential for irreparable harm. He notes that, in the sale of TRBs, “each bearing type and model must be tested by the producer and approved for use in production,” rendering a significant regulatory burden on resellers like his company. ECF No. 17–1 at 20. He further raises the dearth of alternative suppliers, *id.* at 21, as well as the difficulties his corporation faces in financing the tariff deposits that have been levied. *Id.* at 21–22.

Despite these circumstances, Mr. Stocker admits that market forces are leading consumers to take ameliorative steps. *Id.* at 22. To his mind, these “immediate changes away from [C&U Americas]” are unanticipated detriments to his bottom line. *Id.* Disadvantageous as they may be for Mr. Stocker, these market changes fail to meet his high burden to justify injunctive relief. Mr. Stocker provides no evidence of either a harm akin to an imminent plant closure or of specific customers threatened by the involuntary cessation of their business practices. Indeed, some C&U Americas customers have agreed to pay “some or all” of the increased duties, mitigating the harm by which he is aggrieved. *Id.* at 22. By his own observations, therefore, Mr. Stocker’s allegations are substantially less potent than those adduced by other failed injunction applicants.

Plaintiffs’ Motion also lacks evidence of the alleged harm’s immediacy. An authoritative dictionary suggests “immediate” equates to “occurring, acting, or accomplished without loss or interval of time,” providing the synonym “instant,” with the secondary definition of “near to or related to the present.” *Immediate*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/immediate> (last visited April 12, 2022)). Precedent echoes the dictionary. In *Shandong Hua-rong*, an affidavit from an importer’s “major [American] customer” that it would be compelled to cancel all orders in the event the court sustained cash deposits was adjudged “weak evidence, unlikely to justify a preliminary injunction,” largely because it fell short of “indicating exactly how and when these lost sales would force [plaintiff] out of business.” 122 F. Supp. 2d at 1369–70. Mr. Stocker’s affidavit is weaker than in *Shandong*. It merely states that C&U Americas “continue[s] to negotiate with” some buyers to persuade them “to accept a pass through of the duties.” ECF No. 17–1 at 22; *cf. Sunpreme Inc.*, 181 F. Supp. 3d at 1331 (“Without a preliminary injunction . . . [the] loss of goodwill, damage to [Plaintiff’s] reputation, and loss of busi-

ness opportunities from the continued collection of cash deposits until the case is resolved on the merits, . . . will only grow more severe.”); *U.S. Auto Parts Network, Inc. v. United States*, 319 F. Supp. 3d 1303, 1308 (CIT 2018) (finding irreparable harm because financial records demonstrated plaintiff would remain in business for “at best, a couple weeks” if a bond requirement were sustained). Plaintiffs have therefore failed to demonstrate either an irreparable or sufficiently immediate harm to gain injunctive relief.

b. Likelihood of Success

In addition to demonstrating that irreparable harm would occur without an injunction, a movant must also establish a likelihood of success on the merits in its case in order to obtain the extraordinary remedy of enjoining the collection of cash deposits. *Sunprime Inc.*, 181 F. Supp. 3d at 1331. When the Court assesses Commerce’s tariff determinations, the Court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). To begin to meet this standard, Plaintiffs must contest Commerce’s use of partial adverse inferences drawn from facts available. Conclusory statements do not suffice to challenge complex evaluations undertaken by the Government regarding when and how to apply partial adverse inferences drawn from facts available.

Plaintiffs’ arguments do not meet their burden. Instead, they deem the high rate assessed *alone* to be abundant evidence that there must be error in Commerce’s determinations. They cite several cases in which high rates were applied and ultimately found invalid. Pls.’ Mot. at 10–14, ECF No. 17–1. Yet Plaintiffs skip over the interceding analysis that led to the conclusion that a rate defies “commercial and economic reality.” *Baoding Mantong Fine Chemistry v United States*, 113 F. Supp. 3d 1332, 1334 (CIT 2015); Pls.’ Mot. at 10–11, ECF No. 17–1. The Motion seems to imply counsel’s recognition that more is needed, noting “[i]n its [sic] complaint, plaintiffs challenge a number of significant issues.” Pls.’ Mot. at 11, ECF No. 17–1. The sentences that follow merely list these issues; Plaintiffs do not dwell on how they may add up to an incorrect determination by Commerce.

As the Government rightly contends, despite ample opportunity, Plaintiffs “do not challenge the *substance* of Commerce’s Final Results.” Def.’s Resp. at 14, ECF No. 19. Instead, Plaintiffs rest their claim of likely success on the merits on a presumption that Commerce’s determined rate must be “punitive.” Pls.’ Mot. at 11–14, ECF

No. 17–1. Although Plaintiffs could have expanded their analysis to include relevant evidence demonstrating likelihood of success on the merits, they chose not to do so.

Plaintiffs also undermine the confidence the Court might have in their argument by asserting contradictory “issues” they suggest support the likelihood of their success on the merits. They state “the Department’s decision to take partial adverse inferences was not supported by the record as no information was missing from the record.” *Id.* at 11, ECF No. 17–1. The very next issue raised seems to imply the opposite: “[A]ny purportedly missing information was that of unrelated third-parties and the Department cannot impose adverse facts where any purported missing information is that of unrelated parties not under the control of the respondent.” *Id.*, ECF No. 17–1. Failing to provide adequate third-party information may lead both to the application of adverse inferences drawn from the facts available as well as a high tariff rate. In 2010, the CIT upheld such determinations in *Max Fortune Industrial Ltd. v. United States*. 853 F. Supp. 2d 1258. In that case, an informant provided evidence of the petitioner’s provision of insufficient information about third parties. *Id.* at 1262. This proved central to Commerce’s later determination. *Id.* (noting that “[c]omparing the information from Max Fortune and the Chinese Informant during verification, Commerce decided . . . the Chinese Informant’s documents were ‘of a higher quality *and* a larger quantity”). Commerce’s consequent decision to apply “total AFA and [assign] a 112.64% duty margin,” on the basis of an unforthcoming plaintiff’s failure to provide information regarding third parties, was sustained. *Id.* This case is instructive because Plaintiffs presume erroneous conduct on Commerce’s part when appearances may instead suggest established practices were followed. The Motion’s deficiencies thus render it insufficient to demonstrate a high likelihood of success on the merits.

c. Balance of the Equities

Plaintiffs are both mistaken about and manage to misconstrue the balance of equities at this juncture in the case. The harm movants claim they will suffer remains the payment of cash deposits during the period of judicial review. Should they succeed in overturning Commerce’s determination, Plaintiffs admit they will receive “a refund of the excess duties deposited with interest.” Pls.’ Mot. at 10, ECF No. 17–1. America’s retroactive system, financially inconvenient as it may be, is the course adopted by Congress and committed to

Commerce and Customs to enforce. *Valeo N. Am., Inc. v. United States*, 277 F. Supp. 3d 1361, 1366 (CIT 2017) (“[P]aying deposits pending court review is an ordinary consequence of the statutory scheme.”) (quoting *MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 333 (1992)). A typical inconvenience, envisioned by the statutory scheme at hand, does not amount to a cause for equitable relief. As noted earlier, this harm fails to meet the threshold of “irreparability” in the Court’s analysis.

Plaintiffs give short shrift to the harm potentially caused to Defendant. They fail to consider that their assumption of a minimal impact on the United States contradicts “the determinations at the core of this matter that a tariff increase is necessary to counter-act serious injury or the threat of serious injury.” *Corus Group*, 217 F. Supp. 2d 1347, 1356. Commerce’s prior findings suggest that significant harm would result if the effective suspension of the underlying tariff would allow underpriced goods to “flood the market.” *Id.* Absent abnormal facts, a court should be reticent to unwind the entire remedy the Government has ordered, especially when it accords with a clear statutory scheme.

Plaintiffs also misapprehend the risk of nonpayment of the instant tariffs. Their proposed temporary prohibition on paying the required deposits jeopardizes the collection of duties by postponing them. Prior rulings of this Court establish that “[t]his is a more than theoretical possibility.” *Olympia Indus., Inc. v. United States*, 30 CIT 12, 18–19 (2006). Yet Plaintiffs contend the Government “will continue to be protected by the required Continuous Customs Entry Bond at the amount set by established Customs guidelines,” adding that “entries will continue to be subject to a suspension of liquidation and at the same cash deposit rate which has previously applied to [Shanghai] Tainai.” Pls.’ Mot. at 15, ECF No. 17–1. However, this argument mischaracterizes Commerce’s use of bonds to safeguard its execution of duties. As Customs explained earlier this year:

A continuous bond is 10% of duties, taxes and fees paid for the 12 month period. Current bond formulas can be found on www.CBP.gov. A single entry bond is generally in an amount not less than the total entered value, plus any duties, taxes and fees. The amount of any CBP² bond must not be less than \$100, except when the law or regulation expressly provides that a lesser amount may be taken.

² Throughout this opinion, the Court uses “Customs,” instead of CBP, to denote U.S. Customs and Border Protection.

Bonds – How are Continuous and Single Entry bond amounts determined?, U.S. Customs and Border Protection (cbp.gov), <https://bit.ly/cbpbonds> (last accessed: April 27, 2022). The ten percent of duties held in bond is low relative to the total rate that Commerce has determined is necessary. Risking ninety percent of duties through postponement of cash deposit collection is an immediate harm that does not compare to the inconvenience inflicted on Plaintiffs. The balance of equities favors the Government in this instance.

d. Serving the Public Interest

A review of the circumstances surrounding Plaintiffs' Motion demonstrates that the public interest would not be served by granting the relief they seek. Plaintiffs assert that two outcomes resulting from the collection of cash deposits are adverse to the public interest. First, they suggest:

[M]ultiple major U.S. producers of major industrial equipment will lose access to critical components necessary for the production of their major products. While the components represent a comparatively small percentage of the value of the end products, these TRB's, which are approved by the equipment producer for use in their products, cannot be replaced by any other antifraction bearing until a substitute product is located, and completes a lengthy approval process.

Pls.' Mot. at 11–12, ECF No. 17–1. These assertions are undermined by Plaintiffs' own affidavit. Mr. Stoker states that buyers have either agreed or are contemplating agreeing to purchase TRBs with the current duty included. ECF No. 17–1 at 22. These items constitute a small share of the supplies required for the production of other goods, and Plaintiffs notably do not assert that any of their customers are in immediate danger of ceasing production of any goods. ECF No. 17–1. Second, Plaintiffs note that “[i]t is not in the public interest to permanently damage or destroy a business based on a rate which is, on its face, unsupportable.” Pls.' Mot. at 12, ECF No. 17–1. However, once again, the affidavit undermines Plaintiffs' claims. Mr. Stocker's affidavit paints a picture of a company negotiating with its customers to find a way to continue business operations. It nowhere claims plants are on the verge of closure much less that an entire company will be destroyed. ECF No. 17–1. Against these speculative and unsupported claims, the public's greater interest lies in following Congress's legislative enactments in the normal course and ensuring that Customs collects cash deposits sufficient to protect the public fisc. See 19 U.S.C. §§ 1673(c)(1)(B)(ii), 1675(a)(2)(C). The public interest thus

favors the Government; and as Plaintiffs have not clearly prevailed in any of the four required analyses, they are not entitled to the extraordinary remedy of a preliminary injunction. *Winter*, 555 U.S. at 20.

II. Writ of Mandamus

In the alternative, Plaintiffs request a writ of mandamus “directing CBP not to collect cash deposits based on the [F]inal [R]esults.” Pls.’ Mot. at 12, ECF No. 17- 1. In submitting this request, Plaintiffs admit awareness that the writ is a “drastic remedy which is invoked only in extraordinary circumstances.” *Id.* (citing *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980)). Nonetheless, Plaintiffs fail to provide even baseline evidence that the three obligatory criteria for the writ are present.

Mandamus is only appropriate when a three-part test is fully met. The components are: (1) the party seeking mandamus must have no other adequate means to obtain the relief desired; (2) the right for issuance of the writ is “clear and indisputable,” and (3) the issuing court must view the writ as appropriate under the circumstances. *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004). Further, mandamus shall issue only when “limited to enforcement of a specific unequivocal command, the ordering of a precise, definite act . . . about which [a specific government official] had no discretion whatever.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (internal citations and quotations omitted). In response to this precedent, Plaintiffs concede that “[n]ormally, this [right] would be reflected in a ‘final’ Court decision on specific issues which has not yet been implemented because of the existence of other issues.” Pls.’ Mot. at 14, ECF No. 17- 1. They assure the Court that:

In this case, Tainai submits that the right to the writ arises from the fact that, while there is no final Court decision, there is also no question that the Department’s underlying determination is inaccurate and cannot be sustained. Tainai has a right to have this inaccurate and incorrect decision corrected, and to have it corrected before Tainai is severely damaged, if not destroyed by the clearly erroneous decision.

Id.

Plaintiffs’ Motion is insufficient to warrant a writ of mandamus. The three-part test requires that there be “no other adequate means to attain the relief desired.” *Cheney*, 542 U.S. at 380 (emphasis added). This proviso is designed, the Supreme Court has elaborated, “to ensure that the writ will not be used as a substitute for the regular

appeals process[.]” *Id.* at 380–81. Plaintiffs will receive a sufficient remedy if they prevail through the required refund, with interest, of all excessive duties paid. *See* 19 U.S.C. §§ 1671f, 1673f, 1677g; 19 C.F.R. § 351.205(d). Mandamus is not necessary where the normal legal process suffices.

The Court also must reject Plaintiffs’ request because it seeks to compel an outcome for which the Court cannot issue a writ of mandamus. “Commerce enjoys broad, although not unlimited, discretion with regard to the propriety of its use of facts available.” *Goldlink Indus. Co. v. United States*, 30 C.I.T. 616, 622 (2006). Because Plaintiffs’ right to relief rests not on any “specific unequivocal command,” *Norton*, 542 U.S. at 63, but rather a judgment about Commerce’s exercise of its discretion, mandamus will not lie.

CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs’ Motion for a preliminary injunction or, in the alternative, a writ of mandamus. Plaintiffs have not met the criteria necessary for the extraordinary remedy of enjoining the normal operation of the tariff collection system, and a writ of mandamus may not lie where the action challenged is discretionary. It is hereby:

ORDERED that the Motion is **DENIED**.

SO ORDERED.

Dated: June 17, 2022

New York, New York

/s/ Stephen Alexander Vaden

JUDGE STEPHEN ALEXANDER VADEN

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